Supreme Court, U.S.
FILED
DEC 28 2005
OFFICE OF THE CLERK

No. 05-845

In The

Supreme Court of the United States

JORDAN BLAIR,

Petitioner,

vs.

BOB WILLS, aka BOBBY RAY WILLS, aka W. B. WILLS, BETTY SUE WILLS, SAM GERHARDT, BO GERHARDT, DEBORAH GERHARDT, JULIE GERHARDT, DREW PARRISH, ROBERT O'BRIANT, ROBERT KENNEDY, dba MOUNTAIN PARK BOARDING ACADEMY, and PALM LANE BAPTIST CHURCH, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Is a private reform school exempt from the Fair Labor Standards Act (FLSA) where it held Petitioner, then a 17 year old high school graduate, to forced labor at such jobs as fence building, pond digging, cattle herding, etc., based upon the bare assertion that the labor was "primarily" for the benefit of the Petitioner?

2) Is a court ordered committing Petitioner to Respondent's private reform school, with the Respondents' full knowledge that the juvenile was sent by order of an Arkansas court, sufficient to permit a finding of "state action" for purposes of 42 U.S.C. § 1983?

3) Is a private detention facility answerable for false imprisonment of a mature minor, in the absence of any legally valid delegation of authority to detain the minor?

4) Is a juvenile deprived of due process when his opponent is permitted to claim that Respondents' detention facilities teach cleanliness, yet Petitioner cannot show that the Respondents have forced juveniles in their care to eat their own vomit, urinate and defecate on themselves for lack of toileting privileges, etc.?

PARTIES TO THE PROCEEDING

The caption contains the names of all parties in the case below, except defendants Bill Cavitt, Aaron Smith, and Mike Pardos.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jordan Blair respectfully requests that a writ of certiorari be issued to review the judgment of the Eighth Circuit Court in this case.

OPINIONS BELOW

The December 2, 2002 order and judgment of the US District Court for the Eastern District of Missouri, dismissing Petitioner's 1983 claim, is reproduced as App. 1. A March 2, 2004, District Court order dismissing Petitioner's claim for false imprisonment is reproduced as App. 2, and the memorandum is reproduced as App. 3. An April 14, 2004, District Court order dismissing Petitioner's FLSA claims is reproduced as App. 4. A judgment on a $20,000 jury verdict entered the same day is reproduced as App. 5. Bo Gerhardt moved for a new trial, remittitur, or amendment of the judgment to deny Petitioner costs. The District Court memorandum and order dated June 8, 2004, denying this motion in its entirety is reproduced as App. 6. On May 11, 2004, Petitioner appealed the denial of the false imprisonment, FLSA, and 1983 claims. Respondent Bo Gerhardt cross appealed the $20,000 judgment for battery and the denial of the motion for new trial, remittitur, and denial of costs in favor of Petitioner. According to the briefing schedule, the opening brief was originally due August 5, 2004. The time for Petitioner's brief was extended to the August 26, 2004 pursuant to order dated 7-30-04, and a brief was timely filed. The District Court's opinion was affirmed on direct appeal, reversed and remanded on cross appeal, in a panel decision dated August 25, 2005, reproduced as App. 7. A timely petition for rehearing and rehearing en banc was filed, which was denied at the direction of the Court on September 29, 2005, reproduced as App. 8. Therefore, the petition for certiorari is due December 28, 2005.

STATEMENT OF JURISDICTION

Jurisdiction to appeal from the District Court to the Eighth Circuit Court of Appeals is found in 28 U.S.C. § 1291, for appeal from a final decision of the United States District court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), for a petition for writ of certiorari to the 8th Circuit Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

US Constitution Amendment 5, providing that "No person shall . . . be deprived of life, liberty, or property without due process of law. . . . "

US Constitution Amendment 7, providing that "In suits at common law. . . . The right of trial by jury shall be preserved. . . . "

US Constitution Amendment 14, providing that "Nor shall any state deprive any person of life, liberty, or property, without due process of law. . . . "

STATEMENT OF THE CASE

Petitioner was sent to Mountain Park Boarding Academy[1] less than a month before his 17th birthday. Petitioner's father had choked Petitioner to the point of unconsciousness, and admitted in deposition that part of his reason for seeking charges against his son was the concern that a complaint would be made against him for child abuse.

Petitioner's father accused Petitioner in juvenile court of destroying the property of his parents. Petitioner, who had a key to the family home, was deprived of the key without explanation. Petitioner had for many weeks generally used a back door or window for entry to the home, with the full knowledge and apparent acquiescence

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[1] Hereinafter sometimes "Mountain Park."

of his parents. However, on one occasion Petitioner found the windows locked, and forced the door open. The damage was minimal with repairs consisting of renailing a piece of wood. Petitioner left to stay with a brother in another town. No one contends that Petitioner didn't have a right to be in the house, or that he entered for the purpose of stealing or other unlawful purpose, but simply that he entered improperly.

Petitioner was also accused of having assaulted his brother. The brother, in deposition, denied recollection of the alleged assault. Petitioner's father was the sole accuser of Petitioner at the juvenile delinquency hearing. Petitioner's father "proved" the case with hearsay evidence of the assault and proof that Petitioner had forced entry into his own home after having been denied any other form of entry.

The charges against Petitioner were found "true." Petitioner was immediately ordered to "successfully complete in-patient residential treatment at Baptist Boys Academy in Missouri . . . " remanded to the custody of the sheriff, and transported the same day to Mountain Park in Missouri, where Respondents' employees assisted in unloading Petitioner and taking him into the locked compound of the Respondents.

Petitioner, immediately upon arrival at the private reform school, asked for an opportunity to speak to an attorney in order to appeal the adverse court decision and in order to file a Family In Need of Services Petition. Respondent Bo Gerhardt slammed Petitioner against a wall and told Petitioner that he did not have any legal rights while at Respondents' facility. Respondent Sam Gerhardt told Petitioner that he would kill his own son, Bo Gerhardt, if he ever had the audacity to file a court complaint against Sam Gerhardt. This threat, and the unexplained disappearance of various former detainees held by Respondents, is to this day terrifying to the Petitioner.

Petitioner's appointed lawyer, and a subsequent pro bono retained lawyer, called on the telephone asking to speak to Petitioner. Respondent Sam Gerhardt lied, saying

that Petitioner would be told about the calls. Petitioner was unaware of the calls until 5 months later, when he escaped from a sister facility in Florida named Palm Lane Academy,[2] wholly owned by the Respondents in this case.

Petitioner remained at Mountain Park until one week before his 17th birthday, at which time he was transported against his will to Palm Lane. The Respondents admitted that the reason for sending Petitioner to Palm Lane was the belief that Petitioner was entitled to his liberty at the age of 17 in the state of Missouri, but not until the age of 18 in Florida.

Respondents received correspondence from the sentencing court in Crawford County, Arkansas, and signed off on probation documents which were then sent to the Crawford County Court by the Respondents.

Petitioner was ordered to complete the program at Mountain Park. Petitioner successfully completed that program, according to Mountain Park's own records, on November 10, 2001.

Respondents routinely subject new detainees to forced strip searches, forced showers, and the forced administration of certain drugs. Petitioner and his counsel on appeal suspected the administration of Thorazine, Mellaril, Tegretol, and other "control" drugs used for the purpose of preventing flight or resistance of any kind.

Petitioner was unable to obtain a timely and admissible drug test. Petitioner's urine separated into two distinct layers. The top layer appeared to be thick and gritty and the lowest layer was Pepto Bismol pink in color. This discoloration is consistent with the use of Thorazine. Later testing has shown multiple positive drug tests, from multiple laboratories and doctors or other test providers, for Thorazine, Mellaril, and Tegretol, in a number of former students of Mountain Park and/or Palm Lane.

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[2] Hereinafter sometimes "Palm Lane."

Reported symptoms and side-effects of prior detainees give strong indication that Respondents have pervasively used Thorazine on the residents of each facility that they have operated. Thorazine is well known to cause cessation of menstrual periods. Every facility operated by the Respondents has had pervasive cessation of menses for the first 6 to 12 months of the stay for females, generally with lighter periods afterward. Respondents left Mississippi shortly after the entry of a court order commanding them to inform parents when menstrual periods ceased for at least 3 consecutive months.

Petitioner's parents signed authorizations to send Petitioner to Mountain Park. However, those authorizations were made in flagrant violation of Missouri law. Petitioner's parents never signed any documentation whatsoever authorizing Petitioner's transportation to Florida.

At the time that Petitioner was sent to Mountain Park, he had a high school diploma through the Accelerated Christian Education (ACE) program. Petitioner told this to the Respondents, who mocked him and put him in 5th grade level work.

Petitioner was subjected to brainwashing techniques. He was systematically denied sleep, denied bathroom privileges, forced to listen to harangues about the Respondents' religious ideas for hours, threatened with beatings or other punishment for the slightest infraction, forced to work as late as 1:00 to 2:00 AM, and yet forced to rise a few hours later at 5:00 or 5:30 AM. At no time during Petitioner's captivity did Petitioner ever feel rested.

Petitioner was taken on forced running marches. During one such march, another detainee named Duc Nguyen begged to go to the toilet but was prohibited from doing so although the boys were in a private wooded area. Petitioner could only watch helplessly as Nguyen was forced to urinate and defecate in his clothing. Nguyen was forced to apologize to the rest of the group, who were instructed to mock and ridicule the boy.

Petitioner was told and shown that the slightest failure to immediately obey any command, however extreme, was likely to bring a beating or other severe punishment. Any expression of sympathy to Nguyen, or any of a number of other boys forced to urinate or defecate in their clothing, would have prompted a beating or other severe punishment.

Until a murder of a detainee named Will Futrelle in 1996, the Respondents generally gave direct orders to one or more students to beat or otherwise discipline another student. After the murder, the Respondents generally gave the orders for beatings and other mistreatment to intermediaries, who would then use as many other detainees as might be required to impose punishment upon the object of Respondents' wrath.

Respondents formerly operated at least four other facilities for "troubled" teens. Prior to Mountain Park, the most recent was a facility in Mississippi called Bethesda Girls Home. On February 25, 1987, an order was entered which among other things required the Respondents to inform parents when a girl misses her period for at least 3 months.

Respondents maintained a student population of 250-300 students for many years, charging $1,200 per month. Their claimed cost of operations, as claimed in sworn statements in litigation subsequent to the instant case, is $500 per student. Respondents customarily "hire" former students, generally for a salary of about $300 per month for approximately 80 to 100 hours per week.

In late 2003 and 2004, Respondents became aware that Petitioner and his counsel were finding students as they left Mountain Park or Palm Lane, and obtaining drug tests. Respondents were unable to maintain their abusive practices and prevent runaways, despite locked doors and tall fences topped with concertina wire.[3]

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[3] Petitioner suspects that the drugging, and cessation of menses, stopped just before Mountain Park and Palm Lane were closed. There

(Continued on following page)

Respondents then shut down the facility, telling reporters that "its just time to move on." However, Respondent is aware of no instance in which the Respondents closed down a facility such as Mountain Park, earning more than $2 million in annual net profits, except where Respondents were forced to cease operations due to legal action or increased public awareness of Respondents' abusive tactics. Each time, the Respondents open ãnother facility somewhere else and continue on with the same abusive practices.

Respondents say that their enrollment had declined from over 250 to about 40 students at the time the facility was closed down.[4] Furthermore, Respondents have claimed to "lease" the facility to a third party, which also runs a juvenile detention operation apparently quite similar to their own.

Petitioner brought this action for among other things violation of civil rights under 42 U.S.C. § 1983, false imprisonment, violation of the Fair Labor Standards Act (FLSA) and battery. The false imprisonment and 1983 claims were dismissed before trial. The FLSA claim was dismissed during the defense case at trial. The battery claim was decided by the jury, with an award of $20,000 against Bo Gerhardt.

The Eighth Circuit upheld the dismissals, but reversed the award of $20,000 and remanded for a new trial on the claim of battery.

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was a rash of runaways at that time, which suggests that the use of Thorazine was stopped. It has been impossible to obtain reliable information to determine the patterns of cessation of menses.

[4] Respondents testified that if Mountain Park ceased operation, the land and facilities on the land, would have to be turned over to a non-profit organization, bolstering their claim that Mountain Park was a non-profit organization. Subsequent to this testimony, the Mountain Park property and facilities were listed through a real estate company for sale to any interested buyer with an asking price of almost three million dollars. The listing was published on the Internet – complete with photos and the sale price.

REASONS FOR GRANTING THE WRIT

1) **Is a private reform school exempt from the Fair Labor Standards Act (FLSA) where it held Petitioner, then a 17 year old high school graduate, to forced labor at such jobs as fence building, pond digging, cattle herding, etc., based upon the bare assertion that the labor was "primarily" for the benefit of the Petitioner?**

Key facts pertinent to this question include:

- Petitioner was a high school graduate, using the same curriculum as that used by Respondents. The Respondents were fully aware of that fact.
- Petitioner was court ordered to complete the program at Mountain Park. Petitioner completed the program at Mountain Park, by the Respondents' own documentation, less than 30 days after his arrival.
- Petitioner was taken against his will to Palm Lane Academy, Inc., a Florida corporation owned by some of the Respondents, and forced to work 30 to 40 hours per week for the corporation. **(App. 18)**
- Respondents consistently advertise that they are a "college preparatory" high school, and "nothing more than the name implies."

The seminal case on the right of jury trial in FLSA actions is *Lorillard v. Pons* 434 U.S. 575, 580, 98 S.Ct. 866, 870 (1978). There the Court said: " . . . Long before Congress enacted the ADEA, it was well established that there was a right to a jury trial in private actions pursuant to the FLSA. . . . "

The panel opinion says that "chores" cannot constitute compensable labor under FLSA. Petitioner agreed that such chores as cleaning the dorm and his personal space was not compensable. **(TR Vol. II, p. 8-9)** Petitioner sought compensation for building fences, clearing fields

and fencerows, doing carpentry and electrical work, digging ponds, all under threat of violence. Petitioner was forced to work as late as 1:00 AM, and rise later the same day at 5:30 AM for more work. **(TR Vol. II, p. 10)**

The District Court ruled that:

> . . . The evidence at trial demonstrated that Blair's chores were an integral part of the educational curriculum of Mountain Park and Palm Lane and were primarily for the benefit of the plaintiff. **The chores performed by Blair have an economic value to the school** because they save the school the cost of hiring others to perform the chores. **Looking at the totality of the entire economic situation, however, it cannot be said as a matter of law that these economically valuable activities could reasonably be considered employment under the FLSA,** which would require the schools to pay minimum wages to its students.

(Emphases added)

The panel opinion says:

> . . . We review a grant of judgment as a matter of law de novo, drawing all reasonable inferences in favor of the nonmoving party. *Walsh v. Nat'l Computer Sys., Inc.*, 332 F.3d 1150, 1158 (8th Cir. 2003). Judgment as a matter of law is proper when "there is no legally sufficient evidentiary basis for a reasonable jury" to find in favor of the nonmoving party. Fed. R. Civ. P. 50(a); see *Walsh*, 332 F.3d at 1158.
>
> . . . .
>
> In this case, Blair's activities at the schools were not "work," and the Appellees were not "employers," as contemplated under the FLSA. **School administrators testified that chores were an integral part of the educational curriculum at Mountain Park and Palm Lane, and those chores were primarily for**

> **the students,' not the Appellees,' benefit.** Administrators further testified that the chores were intended to instill in each student a sense of teamwork, responsibility, accomplishment, and pride. Although having students perform chores helped defray certain costs that the Appellees would have incurred had they hired employees to perform those tasks, looking at the totality of the economic circumstances, there is no evidence on which a reasonable jury could conclude that Blair's activities constituted employment under the FLSA.

(Emphasis added)

The panel only considered and decided a question very different from the one posed by Petitioner. Nothing was said about Petitioner's testimony, facts, or even his theory of the case. The panel ignored the fact that Petitioner was a high school graduate; that Petitioner sought pay only for tasks that could not reasonably be considered "chores"; that Petitioner was court ordered to Mountain Park and not Palm Lane Academy; that Petitioner as a mature minor was entitled to his liberty in the state of Missouri on his seventeenth birthday, November 17, 2001; that Petitioner's father had an axe to grind with Petitioner; that the parental delegations all violated state law; and that there was no written delegation of parental authority with respect to Palm Lane Academy, Inc., whatsoever.

Petitioner was entitled to a jury determination of the facts with respect to his claim for wages under the FLSA. The 7th Amendment secures Petitioner's right to a jury trial. Under the dictates of *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972), Petitioner had a due process right to at least have *Petitioner's* contentions heard. Neither the District Court nor the Eighth Circuit addressed the questions actually raised by Petitioner.

2) Is a court order committing Petitioner to Respondents' private reform school, with the Respondents' full knowledge that the juvenile was sent by order of an Arkansas court, sufficient to permit a finding of "state action" for purposes of 42 U.S.C. § 1983?

Key facts pertinent to this question include:

- Petitioner was committed to Mountain Park by court order.
- Respondents were aware of the court order. They took Petitioner from the custody of a sheriff, were told about the court order, threatened Petitioner if he said anything further about the court order, and later signed probation papers and sent them to the Arkansas juvenile court.
- Petitioner was denied counsel, the right to appeal, and access to his own juvenile record, all by or at the direction of Respondents.
- Respondents' facilities have been found to be detention facilities. Respondent Bob Wills has in the past been held in contempt for flouting a court order requiring him to disclose his authority to detain minors, and for removing minors from the state in violation of a court order. See *In the Interest of M. I., a Minor*, 519 So. 2d 433 (Miss. Sup. Ct. 1988)

In *C.K. v. Northwestern Human Services,* 255 F.Supp.2d 447, 449 (E.D. Pa. 2003), the Court said:

> The parties have not cited and we have not found any Supreme Court or Third Circuit decision which has decided whether a private facility such as Northwestern Academy acts under color of state law when it has in its custody a delinquent child pursuant to a court order. There are, however, a number of decisions that point the way.

The District Court in that case went on to find, under circumstances similar to those in the case at bar, that the private entity was in fact acting "under color of state law" and denied the motion for summary judgment.

The Eighth Circuit opinion below can be fairly said to contradict *Conner v. Donnelly* 42 F.3d 220 (C.A.4 (Va.) 1994), where the Fourth Circuit ruled that a physician who chose to treat a prison inmate acted "under color of state law." The panel opinion is also at odds with *West v. Atkins* 487 U.S. 42, 108 S.Ct. 2250 (1988), where the Supreme Court ruled the same on a similar question. Therefore, this case presents a conflict between the circuits and a likely conflict with Supreme Court precedent, concerning what constitutes state action with respect to § 1983.

The panel opinion states that the Appellees were not acting "under color of state law" despite the fact that the District Court's order says "On October 24, 2001, Blair was adjudged a juvenile delinquent and ordered to successfully complete in-patient residential treatment at Baptist Boys Academy in Missouri." **(App. 7)** The panel opinion claims that there was "no showing that material facts were disputed or missing from the record."

The panel opinion totally ignored several important factors of the Crawford County, Arkansas Juvenile Court order. First, Petitioner was ordered for treatment. Second, Petitioner was ordered to a facility located in Missouri, not to a facility anywhere the Respondents wanted to send Petitioner. Third, while the panel acknowledges that the requirement was "a condition of probation," it failed to recognize or consider that there was a separate document entitled, Terms and Conditions of Formal Probation, which set forth among others these particularly pertinent requirements at Page 2.

> 8. If it should become necessary for the Juvenile to leave the community where he lives, he will be expected to notify his Probation Officer in advance.

11. The Juvenile will submit to random drug tests through the Juvenile Office.

13. The Juvenile will not carry any weapons.

Petitioner sought his complete juvenile record by way of subpoena in an action ancillary to the lawsuit below. This subpoena was quashed, and the Eighth Circuit order denied review on grounds that the question was moot, since the underlying case was then on appeal. Petitioner still has not seen a copy of the entire probation document that he was required to sign.

Respondents prevented Petitioner from notifying his probation officer that he was leaving the state of Missouri and from reporting for drug tests. They also forced Petitioner to handle firearms as part of a hunter safety class, without permission from the probation officer.

Sam Gerhardt signed the probation papers saying that he would help Petitioner comply with his probation terms. In fact, Petitioner was prevented from complying due to the rules of the Respondents which totally prevented Petitioner's contact with anybody in the outside world, other than his parents. Sam Gerhardt drafted the "Parent/Student Handbook," which the students were not allowed to see, as his master's thesis in college.

The panel opinion rests its opinion on the fact that boilerplate language upon which the order committing Petitioner to Mountain Park contains the words *"or like facility."* (Italics in original) **(App. at 7)**

The Eighth Circuit on November 16, 2004 dismissed an appeal of the denial of an attempt to obtain a copy of the juvenile record of Petitioner, at Petitioner's expense. *Blair v. Wills*, 112 Fed. Appx. 546 (C.A.8 (Ark.) 2004). The unpublished order said the fact that the principal case was on appeal rendered the appeal of the ancillary matter moot. Petitioner believes that the Crawford County Juvenile Court specified Mountain Park in his order stated from the bench. Petitioner should not be denied discovery, then denied relief based upon the inadequacy of proof of a legal claim.

3) Is a private detention facility answerable for false imprisonment of a mature minor, in the absence of any legally valid delegation of authority to detain the minor?

The key facts pertinent to this claim are:

- Petitioner was prevented from contacting an attorney for post-conviction legal assistance; obtaining prescription medication for severe acne; obtaining employment; obtaining adequate sleep time and toileting privileges; or applying to post-secondary educational facilities and applying for post secondary educational loans;
- Respondents prevented Petitioner from contacting his probation officer;
- Petitioner was forcibly transported from Missouri to Florida, without any written parental or court approval, and kept there from his 17th birthday until his escape some 5 months later.
- All written parental delegations of authority: 1) Referenced Mountain Park and not Palm Lane, 2) Flagrantly violated state law, and 3) Made no mention of any right to detain Petitioner outside regular school hours.
- The consents obtained from Petitioner's parents were obtained through fraud and the withholding of material facts.

The key legal contention is that neither the District Court nor the Eighth Circuit considered the question of whether a delegation of parental authority that clearly violates state law would nonetheless suffice to relieve the Respondents of any potential liability for false imprisonment. *Resolution Trust Corp. v. Home Sav. Of America*, 946 F.2d 93 (8th Cir. 1991) holds that such contracts are unenforceable, and confer no rights. Furthermore, neither

court analyzed the consequence of the lack of informed consent, or actual fraud upon the parents, on the minor's right to sue for false imprisonment.

In Mississippi, Respondents were denied a motion to dismiss a lawsuit including a claim for false imprisonment. *Candy H. v. Redemption Ranch, Inc.*, 563 F.Supp. 505 (D.C. Ala. 1983). The court in that case also opined that the evidence, even at that early stage, would preclude summary judgment in favor of Respondents. Respondents have conceded that their operations at Mountain Park and Palm Lane are similar to the operations at their previous facilities.

The panel notes that false imprisonment requires confinement without consent and without justification. The only defense here is justification. In the December 2, 2002 opinion and order dismissing the § 1983 claim, the District Court said that " . . . the Arkansas court's order did not place Blair in the defendant schools, but left the choice of school up to his parents. . . . " **(App. 43)**

At page 4 of the District Court's March 2, 2004 memorandum regarding the false imprisonment issue, the District Court said " . . . On October 24, 2001, Blair was adjudged a juvenile delinquent and ordered to successfully complete in-patient residential treatment at Baptist Boys Academy in Missouri. . . . " **(App. 19)**

Petitioner has suffered a "whipsaw." When the District Court dismissed the § 1983 claim, the District Court said the *parents* sent Petitioner. For the false imprisonment claim, the District Court then relies on the *Court Order* compelling Petitioner to attend Mountain Park.

Nobody contends that the parents gave informed consent: At oral argument, Judge Bowman asked Respondents' counsel if his clients conceded the lack of informed consent. Respondents counsel stood in embarrassed silence until another judge quipped "but even if. . . . " The entire

room full of law students[5] erupted in laughter. Everyone knew that no tenable claim of informed consent was possible even though Respondents had claimed, and the panel accepted, that:

> Blair's parents consented to his enrollment at Mountain Park and Palm Lane with full knowledge of the schools' programs and restrictions, and thus their consent was informed. See Appellees' Supp. App. at 122, Aff. of Ronald G. Blair ¶¶ 8, 16 (confirming that Blair's parents "fully understood and agreed with and to the religious, moral, and educational principals [sic]" of the schools and recognizing that enrollment was an "alternative to juvenile detention").

Petitioner's parents sent him to Mountain Park without being informed that Respondents' methods for juvenile training included deprivation of bathroom privileges, sleep deprivation, deprivation of prescription medications, etc. They stated unequivocally in depositions that he would not have sent Jordan Blair to Mountain Park if he had believed that Jordan would have been deprived of the right to go to the bathroom. **(Joint App. 470-471, 485)** Petitioner's mother Jannett Blair said that she would not have consented had she known about the sleep deprivation. **(Joint App. 479)** So how can anyone suggest, with a straight face, that the Blairs "fully agreed" with such inhumane practices?

The Blair parents affirmed their agreement with Mountain Park's *stated* principles, not the *actual practices* in place at Mountain Park. Furthermore, their affidavit is highly suspect because part of their written agreement was to indemnify Mountain Park for any damages, attorney's fees, or costs assessed in a court of law – even if their son died, and regardless of how negligently or intentionally the Respondents acted to cause the injury.

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[5] Oral argument was held at Washington University School of Law in St. Louis, Missouri.

Petitioner's parents contracted with Mountain Park for the provision of educational services to their 16 year old son. Nothing in that agreement grants or implies any right to imprison Petitioner. In fact, the paperwork signed by the parents and Appellees says that "We (I) understand that Mountain Park Baptist Boarding Academy is no more than the name implies and makes no claims to be anything else." **(Joint App. 488)** In Respondents' Reply of 7-19-2002 **(Joint App. 64)** they claim: " . . . his parents asked Mountain Park Boarding Academy to take him and contracted with Mountain Park Boarding Academy for his *education.*" (Emphasis added.) Such language does not imply a delegation of any right to incarcerate Petitioner.

With respect to the incarceration at Palm Lane Baptist Church, Inc., DBA Palm Lane Academy, there is no evidence of any written agreement in which Petitioner's parents purported to delegate any rights whatever. Furthermore, all the payments made by the parents of Petitioner were sent to Mountain Park. **(Joint App. 467)**

Furthermore, the parents' purported reason for sending Plaintiff to Mountain Park was completely fallacious. Petitioner had already completed the requirements for a high school diploma before his enrollment in Mountain Park. He was awarded the diploma in absentia, from a previously attended "Accelerated Christian Education" school, on 11-10-2001, long before his "unauthorized departure" from Palm Lane Academy. **(Joint App. 123)** Petitioner was sent to Florida, against his will, the same day.

The Missouri statutes include both criminal and civil statutes addressing unlawful detention. RSMo 431.067 provides that:

> Any minor may execute legally binding promissory notes and may legally contract to borrow money to defray the necessary expenses of attending any accredited university, college or conservatory, and shall have full legal capacity to act in his own behalf for the purpose, and shall have all the rights, powers and privileges

> and be subject to the obligations of persons of full age with respect to the contracts and notes.

Defendants, by incarcerating Plaintiff, rendered this legal right a nullity, even though he had his high school diploma, as demonstrated by uncontradicted allegations in his verified complaint.

RSMo. 1.210 provides "No person's body shall be imprisoned or restrained unless by authority of law." RSMo 565.130, False Imprisonment, says:

> 1. A person commits the crime of false imprisonment if he knowingly restrains another unlawfully and without consent so as to interfere substantially with his liberty.
>
> 2. False imprisonment is a class A misdemeanor unless the person unlawfully restrained is removed from this state, in which case it is a class D felony.

In *Resolution Trust Corp. v. Home Sav. Of America*, 946 F.2d 93 (8th Cir. 1991) the Court said:

> In general, a contract entered in violation of federal statutory or regulatory law is unenforceable. See *Comdisco, Inc. v. United States*, 756 F.2d 569, 576 (7th Cir. 1985) (Treasury Regulation Y); *Quinn v. Gulf & Western Corp.*, 644 F.2d at 92-93[6] (federal procurement regulations). This is because "one who has . . . participated in an illegal act cannot be permitted to assert in a court of justice ***any right*** founded upon or growing out of the illegal transaction."

(Emphasis added)

Under certain circumstances, Missouri state law allows a parent to validly give another the consent to restrain a juvenile under the age of 17. However, this consent is of no legal consequence when the person detained is at least 17 years of age.

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[6] *Quinn v. Gulf & Western Corp.*, 644 F.2d 89, 93 (2d Cir. 1981)

RSMo 565.140 provides in pertinent part:

> 1. A person does not commit false imprisonment under section 565.130 **if the person restrained is a child under the age of seventeen** and
>
> (1) **A parent, guardian or other person responsible for the general supervision of the child's welfare has consented to the restraint;**. . . .

(Emphasis added)

The Missouri compulsory education statute sets forth the age at which children may be ***lawfully*** compelled by a parent, guardian, or other person to attend school:

> RSMo 167.031. 1. Every parent, guardian or other person in this state having charge, control or custody of a child not enrolled in a public, private, parochial, parish school or full-time equivalent attendance in a combination of such schools ***and between the ages of seven and sixteen years*** is responsible for enrolling the child in a program of academic instruction which complies with subsection 2 of this section. . . .

(Emphasis added.)

Petitioner was not **"*between* the ages of seven and sixteen years"** – he was beyond 16 years of age when he was unlawfully and without his consent restrained so as to interfere substantially with his liberty.

Petitioner could not be forcibly or lawfully compelled to attend school in Florida by a parent, guardian, or other person, either, because Petitioner had already attained the age of 16 years when he was taken to Florida without his consent:

> 2001 Florida Statutes: 232.01 School attendance. –
>
> (1)(a)1. All children who have attained the age of 6 years or who will have attained the age of 6 years by February 1 of any school year ***or who are older than 6 years of age but who have not attained the age of 16 years,*** except as

> hereinafter provided, **are required to attend school regularly during the entire school term.**

(Emphasis added.)

Respondents had a copy of Petitioner's birth certificate in their possession at the time he was enrolled in Mountain Park in Missouri, and they knew that Petitioner was just one week shy of reaching his seventeenth birthday when he was taken without his consent from Missouri to Florida. They knew from Petitioner's transcript that he had already earned all credits necessary for his high school diploma prior to ever being enrolled at Mountain Park in Missouri. Petitioner's high school diploma was issued the same day he was withdrawn from Mountain Park and taken from Missouri against his will. Clearly, the Respondents had no valid legal defense for their unlawful restraint of Petitioner, either in Missouri or Florida.

RSMo 431.067, "*Contracts of minors to borrow money for higher education – validity*" provides as follows:

> ***Any minor may execute*** legally binding promissory notes ***and may legally contract*** to borrow money to defray the necessary expenses of attending any accredited university, college or conservatory, and shall have full legal capacity to act ***in his own behalf*** for the purpose, **and shall have all the rights, powers and privileges** and be subject to the obligations of persons of full age with respect to the contracts and notes.

(Emphasis added.)

The panel granted judgment based on parental consent. But RSMo 565.140 makes it clear that restraint based upon parental authority cannot extend past the age of 17. The Respondents restrained Jordan Blair long after he reached the age of 17. Respondent Betty Wills stated that:

> A. Because we felt like that there was some teenagers that when they turned 17 they still needed help. **And in Missouri at 17 if they wanted to leave they could leave.** And we

> were wanting to help them more so we went down to Florida and opened up Palm Lane.

(Emphasis added) **(TR Vol. I, p. 121:14-18)**

The Eighth Circuit panel opinion totally fails to address this issue. This Honorable Court should make it clear that it is illegal to forcibly transport a 16 year old to another state, without written parental consent or consent of the minor, on the theory (whether or not valid) that the receiving state allows detention for a longer time period. There is no rational theory of due process that allows a court to simply refuse to address key issues, and thereby deny a litigant the relief otherwise due. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

The power of attorney relied upon by Respondents violated Missouri law in that 1) it was not limited to delegating power to another "individual," and 2) it had no expiration date – it was not limited to one year duration as required by Missouri law.

Missouri law provides:

> RSMo 475.024. A parent of a minor, by a properly executed power of attorney, may delegate to another individual, for a period not exceeding one year, any of his powers regarding care or custody of the minor child, except his power to consent to marriage or adoption of the minor child.

This statute cross references RSMo 453.110, which provides that the unlawful surrender of a minor to the custody of another constitutes a class D felony.

Sam Gerhardt claimed in deposition that he was sure that Petitioner was enrolled in Palm Lane Academy. **(Joint App. 441)** But he admitted that enrollment documents for Palm Lane Academy were never executed, even though copies of the agreement were allegedly sent to Ron and Jannett Blair. **(Joint App. 441-443)**

The panel failed to address or decide the contention that the alleged oral "contract" was unenforceable under Florida's statute of frauds because it wasn't intended to be completed in one year. In *Dwight v. Tobin*, 947 F.2d 455 (11th Cir. 1991), the Court said:

> As an initial matter, the district court was certainly correct in finding that the statute of frauds applies to this contract. Under well-settled Florida law, the statute of frauds bars the enforcement of a contract when the parties intended and contemplated that performance of the agreement would take longer than one year. *Yates v. Ball*, 132 Fla. 132, 181 So. 341, 344 (1937). The intent of the parties may be inferred from the "surrounding circumstances" or the "object to be accomplished."

Sam Gerhardt admitted in deposition that no student has ever graduated from Mountain Park Academy in less than one year. **(Joint App. 455)** Respondents' Enrollment Orientation Agreement informed the Blair parents that "[t]he average enrollment of two years should be anticipated." **(Joint App. 489, ¶ 2)**

Sam Gerhardt says that Petitioner was enrolled in Palm Lane because he was withdrawn from Mountain Park on November 10, 2001. **(Joint App. 441)** Sam Gerhardt later claims that the agreement was an oral one, and that Petitioner was really enrolled in Palm Lane during the initial phone call. **(Joint App. 442)** When confronted with the fact that the enrollment agreement with Mountain Park called for a term of one year, he said the dates on documents bear no relationship to the reality of the agreements with parents. **(Joint App. 444)**

So what did we have? An oral agreement to enroll Plaintiff at Palm Lane Academy at the time the parties were contracting for a one year stay at Mountain Park? Or was it an oral agreement formulated less than three weeks later when Petitioner was withdrawn from Mountain Park?

Ron Blair admitted that he sent all six of his monthly tuition payments to Mountain Park. **(Joint App. 466-477)** Robert O'Briant swore in his affidavit filed 8-22-2002, paragraph 10, that: "The finances of Park (sic) Lane Baptist Church, Inc. are strictly in Florida, and there is no financial relationship with Mountain Park Baptist Academy." **(Joint App. 493)**

There was no valid delegation by the Blair parents of any right or bundle of rights that would include the right of Palm Lane Baptist Church, Inc., to detain the Petitioner, preventing him from obtaining medicine or legal services. Yet Betty Sue Wills admitted in deposition **(Joint App. 462-463)** that Petitioner was not allowed to leave the Palm Lane property:

> Q He [Jordan Blair] didn't have any way to go get that [acne] medication himself; did he?
>
> A No, sir. He couldn't leave the [Palm Lane Church/Academy] property.

The Mature Minor Doctrine cannot be overlooked in this case. That doctrine arose out of the constitutional right to privacy cases concerning abortion. In *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 103 S.Ct. 2481, 76 L.E.2d 687 (1983), the Supreme Court permitted "mature minors to consent to abortions without parental approval through the exercise of constitutional rights." See *Note, Forcible Repatriation of Minors: The Competing Rights of Parent and Child*, 37, Stanford L. Rev. 187, 207 (1984) for a discussion on *City of Akron* and other cases as they relate to the rights of minors generally. ("The 'mature minor' doctrine . . . reflects a new way of dealing with parent-child disputes involving the minor's fundamental rights as the minor approaches adulthood." Id. at 208.) See also *In re E.G., a Minor*, 133 Ill.2d 98, 549 N.E.2d 322, 326 (Sup. Ct., Ill., 1989), for application of the Mature Minor Doctrine in the areas of freedom of expression, the constitutional right to be free from unreasonable search and seizure, and procedural due process.

4) Is a juvenile deprived of due process when his opponent is permitted to claim that Respondents' detention facilities teach cleanliness, yet Petitioner cannot show that the Respondents have forced juveniles in their care to eat their own vomit, urinate and defecate on themselves for lack of toileting privileges, etc?

The key facts pertinent to this claim are:

- Respondent Bo Gerhardt claimed that their goal was to teach cleanliness. The Eighth Circuit held that it was reversible error for Petitioner to show the jury that the Respondents forced juveniles in their care to eat their own vomit, urinate and defecate on themselves, etc.
- Respondents presented testimony that they used the King James Bible. When Petitioner showed that some of his King James Bibles were confiscated, the Eighth Circuit included that evidence as "misconduct" on the part of Petitioner's counsel.

The principal legal contention is that a defendant cannot "open the door" to testimony and then cry foul. *United States v. Steele*, 610 F.2d 504, 505 (8th Cir. 1979).

The panel cites 6 supposedly offensive questions, for their claim that Petitioner's attorney asked improper questions. Not one of these questions was actually improper.

Space considerations militate in favor of Petitioner debunking the two most serious claims cited by the panel as bad acts of Petitioner's counsel. The remaining claims by the panel are equally meritless.

First, concerning the question about forcing students to eat foul food, Petitioner's counsel was informed by Ray Palmer that Bo Gerhardt had forced Ray Palmer to eat his own vomit, whereas another staffer had attempted to force

him to eat vomit from out of a toilet. Bo Gerhardt had testified on direct that " . . . No. 1 in my mind is that a Christian ought to make sure their body is kept nice and clean because it is the temple of God." **(TR Vol. II, Page 85)**

Petitioner wished to get an explanation of how such religious beliefs squared up with forcing or trying to force people to eat their own vomit. Bo Gerhardt eagerly restated his commitment to teaching cleanliness, but Mr. Briggs vigorously objected under Rule 613(b) to the question about whether students were forced to eat foul food. Rule 613(b) requires confrontation before the use of extrinsic evidence of a prior inconsistent statement. **(TR Vol. II, Page 120)** Undersigned counsel did not know at that time of any written documentation of this incident, and had no intention of presenting any such document. *United States v. Beason*, 220 F.3d 964, 968 (8th Cir. 2000), holds that the evidence was proper:

> The trial court has broad discretion in the admission of evidence and its decision will be overturned on appeal **only if there has been an abuse of discretion**. See *United States v. Rogers*, 939 F.2d 591, 594 (8th Cir. 1991). "It is fundamental that where the defendant 'opened the door' and 'invited error' ***there can be no reversible error.***" *United States v. Steele*, 610 F.2d 504, 505 (8th Cir. 1979). We have allowed the use of otherwise inadmissible evidence to clarify or rebut an issue opened up by defense counsel on cross-examination.

(Emphasis added) (citation omitted)

The United States Supreme Court declared in *United States v. Mandujano*, 425 U.S. 564, 576 (1976), "[p]erjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings. Effective restraints against this type of egregious offense are therefore imperative." See also *ABF Freight System, Inc. v. NLRB*, 510 U.S. 317, 323 (1994) ("False testimony in a formal proceeding is intolerable. We must neither reward nor condone

such a 'flagrant affront' to the truth-seeking function of adversary proceedings.").

As the United States Supreme Court noted in *In re Michael*, 326 U.S. 224, 227 (1945), "[a]ll perjured relevant testimony is at war with justice, since it may produce a judgment not resting on truth. . . . [I]t cannot be denied that it tends to defeat the sole ultimate objective of a trial."

Regarding the King James Bibles, Respondent's counsel raised the issue by asking if "their [Respondents'] version of the Bible is the King James version of the Bible?" **(TR Vol. II, page 47)** Petitioner's counsel attempted to clarify the Respondents' understanding of the term "King James version" with an eye toward bringing out the fact that the Respondents had confiscated Petitioner's King James Bible that the Respondents deemed heretical.[7] The District Court ruled "Well, we've gone enough into that." Only the Respondents got to tell their side of the story.

If the 8th Circuit decision stands, what keeps Bo Gerhardt from making the same pious declarations of teaching cleanliness, knowing that any proof that he tried to force students to eat their own vomit, and at least one other employee of Respondents tried to force a student to eat their own vomit from a toilet?

This does not merely prevent Petitioner from proving the truth, and obtaining redress for his torts against him. It also places Petitioner in jeopardy of a large assessment for costs, which would be financially devastating to Petitioner. Petitioner currently maintains a full time employment at $7.75 per hour, and simultaneously attends the University of Arkansas at Fort Smith.

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[7] Respondents have their own tests for Bibles. If the Bible uses the word "throughly" instead of "thoroughly" in a certain passage, and passes several other tests, then it is acceptable. Otherwise it is considered contraband and confiscated from the students.

CONCLUSION

This Court must deal with many requests for certiorari. If the Court should so choose, this particular request need not consume much of the Court's time. Supreme Court Rule 16(1) permits this Court to summarily dispose of cases on the merits. This case does not necessarily require scholarly analysis since the courts below have simply refused to address the issues that mandate relief for Petitioner.

If the Respondents think that any fact or legal conclusion herein is erroneous, they have the right to file a brief pursuant to Supreme Court Rule 15. Absent such a filing, or in the event that the filing does not squarely meet and deny the allegations of the petition, it is plain that the Petitioner has shown himself entitled to the issuance of the writ.

The Court has in hundreds of cases summarily vacated judgments and remanded the case to a court of appeals, with respect to the *U.S. v. Booker,* 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) issue alone. For example, see *West v. United States*, 2005 U.S. LEXIS 3295 (U.S. 2005), where the Court said:

> OPINION: On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Motion of petitioner for leave to proceed in forma pauperis and petition for a writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *U.S. v. Booker,* 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005).

Judicial economy is a wonderful principle. Unless the Respondents make a substantial challenge to the facts and law set forth herein, this Court is fully empowered to simply issue the following order:

> OPINION: On petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit. Petition for a writ of certiorari

> granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Eighth Circuit for further consideration in light of [here cite cases].

Otherwise, the Respondents would likely assume this Court's action to amount to a stamp of approval on their specific misconduct in this case, and similar acts of misconduct. Although a summary denial of certiorari does not carry the same weight as a full decision after argument, in *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 306 (1998), this Court said that "[o]ur summary dismissals are . . . to be taken as rulings on the merits in the sense that they rejected the specific challenges presented . . . and left undisturbed the judgment appealed from. . . . "

This Court has supervisory power and has used that power in the past. In *Nguyen v. U.S.* 539 U.S. 69, 73-74, 123 S.Ct. 2130 (U.S. 2003) the Court said:

> . . . In accordance with this Court's Rule 10(a), we granted the writ, 537 U.S. 999, 123 S.Ct. 512, 513, 154 L.Ed.2d 394 (2002), to determine whether the Court of Appeals had "so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory powers."

Petitioner submits that the facts demonstrate a proper case for the Court to exercise its supervisory power. The honor and reputation of the judicial branch of government depend upon the maintenance of consistent and certain discipline, when lower courts fail to address and decide the legal questions necessarily and properly before them for decision.

Abusive boarding schools have devastated thousands of lives and killed many teens. One girl who had been in an abusive boarding school, suffering from deprivation of toileting privileges, with the accompanying self-denial of water, was forced to go on a long and arduous forced march through desolate country. Faint with thirst, she begged for water. Her peers were forced to mock and ridicule her, and deny her reasonable request, as she

slipped into a coma from which she never emerged. She died. Sadly, such incidents are a regular occurrence, often with little or no disclosure to the public.

A partial list of deaths is available at http://www.ficausa.com/deaths.html. The most recent casualty was 12 year old Christening "Mikie" Garcia, suffocated to death by her captors on December 5, 2005.

The following, from the book, AN AMERICAN GULAG, written by Alexia Parks, gives an encapsulated description of what transpired before Nicholaus Contreraz died:

> For several weeks before he died on March 2, 1998, Nicholaus Contreraz (16), was suffering from diarrhea and continuous vomiting. For days before his death, he was then made to carry around a trash can containing his vomit and the clothes he had defecated in.
>
> Hours before he died, he was required to stretch out in a "hold" position with his feet on a desk and his face over a bucket of his own vomit.
>
> Moments before he died, he was put into a wheelbarrow and required to make the sounds of an "ambulance." He was being wheeled to a volleyball game and because he could not stand, the staff "assisted" him in getting the ball over the net.
>
> At the moment of Nicholaus' death, staff threw a bucket of water on him. . . . They told him "it's all in your head." When he didn't respond, they took a closer look. He was dead.
>
> An autopsy showed 2 1/2 quarts of pus in his partially collapsed left lung.

Some of the kids in boarding schools really are troubled. Others, like the girl who died for lack of water with other kids all around, had little or no history of trouble. The girl was sent to the school because she was raped, not because she was a discipline problem.

Of course, juvenile delinquency, even if true, is no reason to subject a juvenile to the death penalty. This

Court would step in without hesitation to prevent any of these children from being executed for their youthful misdeeds. Surely this Court cannot allow the killing to continue because the victims are taken at random and slowly abused to death.

Those who have grown wealthy flouting the laws on taxation, torts, contracts, fair labor standards, and whatever else gets in their way, have celebrated the Eighth Circuit's decision below, ratcheting up the abuse. They boast of their invulnerability. This august tribunal, and perhaps no one else, has the power to inform them otherwise.

Respectfully submitted,

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APPENDICES

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 04-2434

Jordan Blair,

Plaintiff-Appellant,

v.

Bob Wills, also known as W. B. Wills, also known as Bobby Ray Wills; Betty Sue Wills; Sam Gerhardt; Deborah Gerhardt; Bo Gerhardt; Julie Gerhardt; Drew Parrish; Robert O'Brient; Robert Kennedy, doing business as Mountain Park Boarding Academy; Palm Lane Baptist Church, Inc.,

Defendants-Appellees.

: Appeals from the United States District Court for the Eastern District of Missouri.

No. 04-2539

Jordan Blair,

Plaintiff-Appellee,

v.

Bob Wills, also known as W. B. Wills, also known as Bobby Ray Wills; Betty Sue Wills; Sam Gerhardt; Deborah Gerhardt,

Defendants-Appellants,

Bo Gerhardt,

Defendant,

Julie Gerhardt; Drew Parrish; Bill Cavitt; Robert O'Brient; Aaron Smith; Robert Kennedy; Mike Pardos, doing business as Mountain Park Boarding Academy; Palm Lane Baptist Church, Inc.,

Defendants-Appellees.

No. 04-2540

Jordan Blair,

Plaintiff-Appellee,

v.

Bob Wills, also known as W. B. Wills, also known as Bobby Ray Wills; Betty Sue Wills; Sam Gerhardt; Deborah Gerhardt,

Defendants,

Bo Gerhardt,

Defendant-Appellant,

Julie Gerhardt; Drew Parrish; Robert O'Brient; Robert Kennedy, doing business as Mountain Park Boarding Academy; Palm Lane Baptist Church, Inc.,

Defendants.

Submitted: March 15, 2005
Filed: August 25, 2005

Before ARNOLD, BOWMAN, and RILEY, Circuit Judges.

BOWMAN, Circuit Judge.

Jordan Blair sued the Appellees, alleging that they violated various federal and state laws while Blair was a student at boarding schools in Missouri and Florida. Prior to trial, the District Court granted the Appellees' motion to dismiss Blair's claim under 42 U.S.C. § 1983 (2000) and the Appellees' motion for summary judgment on Blair's state-law claim of false imprisonment. The District Court also granted summary judgment on Blair's state-law battery claim with respect to all Appellees except for Bo Gerhardt. During trial, the District Court granted the Appellees' motion for judgment as a matter of law on Blair's claim under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219 (2000). Blair's battery claim against Bo Gerhardt was submitted to the jury, which returned a verdict against Gerhardt and awarded Blair $20,000 in damages. The District Court denied Gerhardt's motion for a new trial. Blair appeals the District Court's adverse rulings as to his claims, and we affirm. Bo Gerhardt cross-appeals the District Court's denial of his motion for a new trial. We reverse the District Court's judgment with respect to Gerhardt's motion and remand for a new trial.

I.

In October 2001, Blair, who was sixteen years old at the time, was arrested in Crawford County, Arkansas, and charged with terroristic threatening and criminal mischief. Blair's parents asked the Juvenile Division of the Circuit Court of Crawford County, Arkansas (Juvenile Court), to place Blair on probation and order him to complete a residential term at a Baptist boarding academy in lieu of sentencing him to a term of confinement at a juvenile detention facility. At Blair's juvenile adjudication hearing, the Juvenile Court ordered that Blair be placed on probation and that, as a term of his probation, Blair complete "in-patient/residential treatment at Baptist Boys Academy in Missouri (or like facility)." Joint. App. at 250 (Order of Juvenile Court dated October 24, 2001).

Blair's parents had previously submitted an application for Blair's enrollment at Mountain Park Boarding Academy in Missouri (Mountain Park) and had executed a power of attorney delegating parental authority to school administrators. School administrators recommended that Blair be transferred to Mountain Park's sister school, Palm Lane Academy in Florida (Palm Lane), after a brief stay at Mountain Park, and Blair's parents agreed. Pursuant to his parents' wishes, Blair was transported to Mountain Park immediately after the adjudication hearing and remained at the school from October 24, 2001, until November 9, 2001, at which time he was transferred to Palm Lane. He resided at Palm Lane until he left without permission on March 15, 2002.

Mountain Park and Palm Lane are Baptist boarding schools offering students an "Accelerated Christian Education" curriculum. In conjunction with this curriculum,

students attending the schools are required to perform various chores, including laundry, cleaning, lawn-mowing, brush-clearing, painting, general maintenance, and other tasks. School administrators testified that performing the various chores is an integral part of the learning environment at Mountain Park and Palm Lane and is intended to instill in each student a sense of teamwork, responsibility, accomplishment, and pride.

Blair alleges that, pursuant to the Appellees' policies, he was physically and psychologically abused while residing at Mountain Park and Palm Lane. Among other allegations, he maintains that the Appellees denied him reasonable bathroom privileges; forced him to remain on school premises; assaulted him; subjected him to systematic sleep deprivation; required him to attend religious services; and forced him to work without pay in Appellees' for-profit businesses. This alleged mistreatment forms the basis of Blair's various claims.

II.

Blair first argues that the District Court erred in dismissing his § 1983 claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief could be granted. As a preliminary matter, we note that although the District Court described its ruling as a dismissal under Rule 12(b)(6), it appears that the Appellees offered affidavits and other documents outside the pleadings in support of their motion and that the District Court considered these submissions in making its ruling. Because the court considered matters outside the pleadings, the Rule 12(b)(6) motion to dismiss is treated as a Rule 56 motion for summary judgment. *See*

Fed. R. Civ. P. 12(b). In such a case, notice to the nonmoving party – whether actual or constructive – is typically required. *See Angel v. Williams*, 12 F.3d 786, 788 (8th Cir. 1993) (noting that Rule 12(b) "does not require the court to give affirmative notice to the parties of its intent to consider matters outside the complaint"; constructive notice is sufficient when plaintiff has adequate time to respond). In the circumstances of this case, any lack of formal notice by the District Court that it would treat the motion filed by the Appellees as a motion for summary judgment rather than a motion to dismiss was harmless. The Appellees filed their motion to dismiss on July 19, 2002. Blair filed his response on August 7, 2002. The District Court granted Blair leave to amend his complaint on August 29, 2002 – well after the Appellees submitted their facts. The court did not rule on the Appellees' motion until December 2, 2002, over three months after Blair filed his First Amended Complaint. Blair had ample opportunity to respond to the Appellees' motion, and there has been no showing that material facts were disputed or missing from the record. *See Madewell v. Downs*, 68 F.3d 1030, 1048 (8th Cir. 1995) (stating lack of formal notice is harmless if the nonmoving party had an adequate opportunity to respond to the motion, and material facts were neither disputed nor missing from the record); *Davis v. Johnson Controls, Inc.*, 21 F.3d 866, 867 (8th Cir.) (same), *cert. denied*, 513 U.S. 964 (1994).

Having determined that the District Court's Rule 12(b)(6) dismissal should be treated as a Rule 56 grant of summary judgment, we must determine whether it was properly granted. We review de novo the District Court's grant of summary judgment. *Shanklin v. Fitzgerald*, 397 F.3d 596, 602 (8th Cir. 2005). Summary judgment is proper

only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* (quoting Fed. R. Civ. P. 56(c)). We view the evidence and the inferences that may reasonably be drawn therefrom in the light most favorable to the nonmoving party. *Id.*

To proceed on his § 1983 claim, Blair was required to establish that the Appellees deprived him of his constitutional rights while acting "under color of state law." *See Adams ex rel. Harris v. Boy Scouts of Am.-Chickasaw Council*, 271 F.3d 769, 777-78 (8th Cir. 2001) (noting that conduct of private party may be attributed to state where state has "situated itself in a position of interdependence with" private party). Blair attempts to satisfy this requirement by arguing that, because the Juvenile Court ordered him to attend Mountain Park, state action may be imputed to the school. The District Court found this argument unavailing and so do we. At the request of Blair's parents, the Juvenile Court ordered that Blair complete treatment at "Baptist Boys Academy in Missouri (*or like facility*)." Joint App. at 250 (Order of Juvenile Court dated October 24, 2001) (emphasis added). Contrary to Blair's assertions, the Juvenile Court did not place Blair at Mountain Park or Palm Lane. Rather, the choice of boarding school was left to Blair's parents, who completed an application for Blair's admission at Mountain Park, consented to Blair's transfer to Palm Lane, and signed a power of attorney delegating authority over Blair to school administrators. Blair did not establish that Mountain Park or Palm Lane received state-provided funds or accepted referrals or placements directly from state courts. Because Blair presented no evidence that the Appellees were acting under color of state law, the District Court did

not err in granting the Appellees' motion for summary judgment on Blair's § 1983 claim.

III.

Blair next argues that the District Court erred in granting the Appellees' motion for summary judgment on his state-law claim of false imprisonment. As noted above, we review de novo the District Court's grant of summary judgment, viewing the evidence in the light most favorable to the nonmoving party. We affirm if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Shanklin*, 397 F.3d at 602.

Missouri state law governs the substance of Blair's false imprisonment claim. *Dairy Farmers of Am., Inc. v. Travelers Ins. Co.*, 292 F.3d 567, 572 (8th Cir. 2002) (noting that when jurisdiction over an issue is based on diversity, court applies substantive law of the forum state). To proceed on his false imprisonment claim, Blair was required to show that he was confined without his consent and without legal justification. Mo. Rev. Stat. § 565.130 (2000); *Rankin v. Venator Group Retail, Inc.*, 93 S.W.3d 814, 819 (Mo. Ct. App. 2002); *Hyatt v. Trans World Airlines, Inc.*, 943 S.W.2d 292, 299 (Mo. Ct. App. 1997). In determining whether a minor has consented to a confinement, we may consider whether the minor's parents have consented on his behalf because parents exercise authority over the custody, care, and management of their children, *Whisman v. Rinehart*, 119 F.3d 1303, 1309 (8th Cir. 1997); Mo. Rev. Stat. § 475.025 (2000), and may delegate that authority on behalf of their minor children, Mo. Rev. Stat. § 431.061 (2000) (allowing parents to give consent for medical treatment on behalf of minor children); Mo. Rev.

Stat. § 631.105 (2000) (authorizing parents to enroll or commit children to treatment facilities).

According to Blair, the Appellees detained him at Mountain Park and Palm Lane without his consent and without legal justification. Blair contends that his parents' consent to enroll him at Mountain Park and Palm Lane was not informed and was therefore invalid. Consequently, Blair concludes, he was falsely imprisoned by the Appellees. We disagree.

Blair was sixteen years old and a minor when his parents enrolled him at Mountain Park. Blair's parents completed an application for his enrollment at Mountain Park; they understood that Blair would be transferred to Palm Lane; and they signed a power of attorney conveying parental authority to school administrators. *See* Joint. App. at 321-22 (Jannett Blair Decl.); *Id.* at 323-24 (Ron Blair Decl.). Although Missouri courts have not addressed specifically whether a private school may be liable for false imprisonment when a custodial parent consents to the child's enrollment and attendance at the school, we conclude that, in the circumstances of this case, the Missouri courts would agree that Blair cannot maintain an action for false imprisonment. Parents have a recognized liberty interest in the care, custody, and management of their children, *Swipies v. Kofka*, 348 F.3d 701, 703 (8th Cir. 2003), and have the right to direct the upbringing and education of their children, *Doe "A" v. Special School Dist. of St. Louis County*, 637 F. Supp. 1138, 1146 (E.D. Mo. 1986); *Reece v. Reece*, 890 S.W.2d 706, 710 (Mo. Ct. App. 1995) (acknowledging that parent may arrange for another to provide care and education for minor child). Blair's parents consented to his enrollment at Mountain Park and Palm Lane with full knowledge of the schools' programs

and restrictions, and thus their consent was informed. *See* Appellees' Supp. App. at 122, Aff. of Ronald G. Blair ¶¶ 8, 16 (confirming that Blair's parents "fully understood and agreed with and to the religious, moral, and educational principals" of the schools and recognizing that enrollment was an "alternative to juvenile detention"). The District Court did not err in finding that the Appellees were entitled to summary judgment on Blair's false-imprisonment claim.

IV.

Finally, Blair argues that the District Court erred in granting the Appellees' motion for judgment as a matter of law on his FLSA claim. Blair alleges that while he was enrolled at Mountain Park and Palm Lane, the Appellees forced him to work without pay in violation of the FLSA. We review a grant of judgment as a matter of law de novo, drawing all reasonable inferences in favor of the nonmoving party. *Walsh v. Nat'l Computer Sys., Inc.*, 332 F.3d 1150, 1158 (8th Cir. 2003). Judgment as a matter of law is proper when "there is no legally sufficient evidentiary basis for a reasonable jury" to find in favor of the nonmoving party. Fed. R. Civ. P. 50(a); *see Walsh*, 332 F.3d at 1158.

Under the FLSA, an employer must pay a minimum wage to its employees who work in covered activities. *See* 29 U.S.C. § 206 (2000). The Supreme Court has defined "work" to include "physical or mental exertion . . . controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944) (footnote omitted). In determining whether an entity functions as an individual's employer, courts generally look to the economic reality of

the arrangement. *See Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961) (explaining that "'economic reality' rather than 'technical concepts' is . . . the test of employment" under the statute). In this case, Blair's activities at the schools were not "work," and the Appellees were not "employers," as contemplated under the FLSA. School administrators testified that chores were an integral part of the educational curriculum at Mountain Park and Palm Lane, and those chores were primarily for the students', not the Appellees', benefit. Administrators further testified that the chores were intended to instill in each student a sense of teamwork, responsibility, accomplishment, and pride. Although having students perform chores helped defray certain costs that the Appellees would have incurred had they hired employees to perform those tasks, looking at the totality of the economic circumstances, there is no evidence on which a reasonable jury could conclude that Blair's activities constituted employment under the FLSA. The District Court did not err in granting the Appellees' motion for judgment as a matter of law on Blair's FLSA claim.

V.

Bo Gerhardt argues that the District Court abused its discretion in refusing to grant his motion for a new trial. Gerhardt contends that Blair's attorney repeatedly introduced irrelevant and prejudicial matters into the proceedings and that this misconduct was so severe that he is entitled to a new trial. "[I]mproper questioning by counsel generally entitles the aggrieved party to a new trial if it conveys improper information to the jury and prejudices the opposing litigant." *Silbergleit v. First Interstate Bank of Fargo*, 37 F.3d 394, 398 (8th Cir. 1994) (citing *Sanders-El v.*

Wencewicz, 987 F.2d 483, 484 (8th Cir. 1993)). When counsel repeatedly attempts to use irrelevant and prejudicial evidence, the possibility of improper influence is increased. *Id.* Counsel's misconduct may be such that a district court cannot overcome its prejudicial effect by admonishing the jury or rebuking counsel; in such case a court should grant a new trial. *Id.* The District Court has broad discretion in deciding whether questioning by counsel is so prejudicial that a new trial is warranted, *Id.*, and we review this determination for abuse of discretion only, *Marvin Lumber & Cedar Co. v. PPG Indus.*, 401 F.3d 901, 917 (8th Cir. 2005).

Prior to trial, the Appellees filed a motion in limine with the District Court seeking to exclude evidence they argued was irrelevant to Blair's FLSA and battery claims. The District Court granted the motion insofar as it agreed with the Appellees that the evidence was irrelevant to Blair's remaining claims. *See* Transcript Vol. I at 13-44 (excluding evidence of, inter alia, a conspiracy by Appellees' to deprive Blair of his constitutional rights, false imprisonment, cruel and unusual punishment, deprivation of medicine and educational materials, and denial of bathroom privileges and sleep). Nevertheless, by our count, the Appellees properly objected in open court to questioning by Blair's counsel on eighteen occasions during the first day and on thirty-four occasions during the second day of a two-and-a-half-day trial. Among other objectionable questions, Blair's counsel asked witnesses whether the school prohibited students from having the King James version of the Bible; whether students were required to attend religious services; whether Blair was denied access to an attorney; whether the school had a racial nondiscrimination policy; whether students were

confined; and whether students were forced to eat rotten or spoiled food. The District Court sustained an objection after each of these questions, but did not strike the offending question or immediately instruct the jury to disregard the irrelevant information. Although the District Court repeatedly reminded Blair's counsel to focus on the claims remaining in the case – the FLSA and battery claims – and to refrain from injecting irrelevant and prejudicial evidence into the proceeding, these admonitions were unsuccessful. Unfortunately, the ongoing introduction of irrelevant information, the repeated objections by Appellees, and the frequent warnings and admonitions by the District Court likely gave jurors the impression that something more happened than they were being told. When the case is a close one, the possibility that improper conduct could have influenced the jury's verdict is increased. *Silbergleit*, 37 F.3d 398. The fact that the jury awarded Blair $20,000 on relatively weak evidence of battery supports our conclusion that Gerhardt was prejudiced by the misconduct of Blair's counsel.

The line of questions posed by Blair's counsel over the course of the two-and-a-half-day trial emphasized irrelevant information having no bearing on the issues remaining in the case and demonstrated a persistent effort by Blair's counsel to get this information before the jury, despite repeated admonitions by the District Court. Although the District Court made a valiant attempt to rein in Blair's attorney, the improper and prejudicial questioning continued. We believe that the combined effect of these questions was to present to the jury an abundance of irrelevant evidence that had no bearing on the merits of the remaining claims and served only to prejudice the jury against Gerhardt. Consequently, we conclude that the

District Court abused its discretion by denying Gerhardt's motion for a new trial on Blair's battery claim.

VI.

In conclusion, we affirm the District Court's dismissal of Blair's § 1983, false imprisonment, and FLSA claims. We reverse the District Court's denial of Gerhardt's motion for a new trial and remand the case for further proceedings on Blair's battery claim.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

JORDAN BLAIR,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 1:02-CV-88 CAS
	)	
BOB WILLS, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

This matter is before the Court on defendants' motions for summary judgment. Plaintiff filed a memorandum in opposition to defendants' motions. For the following reasons, the Court will deny defendants' motions for summary judgment as to the Fair Labor Standards Act, grant defendants' motions for summary judgment as to the false imprisonment claim, and grant defendants' motions for summary judgment as to the battery claims against all defendants except Bo Gerhardt.

Background

Plaintiff Jordan Blair filed this case against defendants alleging violation of his constitutional rights under 42 U.S.C. §§ 1983, 1985, and violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201, et seq. Blair also alleged state law tort claims of battery and false imprisonment.[1] The Court dismissed the constitutional

[1] Both parties rely on Missouri law in support of their arguments on summary judgment for the tort claims.

claims under 42 U.S.C. §§ 1983 and 1985. Order of December 2, 2002. The defendants moved for summary judgment on the remaining claims of violation of FLSA, false imprisonment, and battery. There are ten defendants in this case: Bob Wills, Betty Sue Wills, Sam Gerhardt, Deborah Gerhardt, Bo Gerhardt, Julie Gerhardt, Drew Parrish, Robert O'Briant, Robert Kennedy, and Palm Lane Baptist Church, Inc. Bob Wills, Betty Sue Wills, Sam Gerhardt, Deborah Gerhardt, Bo Gerhardt, Drew Parrish, and Robert O'Briant are employees of Mountain Park Boarding Academy ("Mountain Park"), which is located in Missouri. Defendants Robert Kennedy is an employee of Palm Lane Boarding Academy ("Palm Lane"); which is located in Florida.

Blair alleges that he was compelled to work without pay for thirty to forty hours a week on defendants' business enterprises at Mountain Park and Palm Lane. Blair further alleges that he was falsely imprisoned by defendants because his parents' consent to enroll him at the two schools was not an informed consent. Finally, Blair alleges that he was a victim of battery at both schools.

The defendants assert that Blair's work at the schools is not governed by FLSA. The defendants also state that Blair's parents consented to his enrollment, therefore, they cannot be liable for false imprisonment. Finally, defendants state that Blair alleged one instance of battery against Bo Gerhardt only; the battery claims against the other defendants should be dismissed and the battery claim remanded to state court.

Standard

The standards applicable to summary judgment motions are well settled. Pursuant to Federal Rule of Civil Procedure 56(c), a court may grant a motion for summary judgment if all of the information before the court shows "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *See Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). The initial burden is placed on the moving party. *City of Mt. Pleasant, Iowa v. Associated Elec. Co-op., Inc.,* 838 F.2d 268, 273 (8th Cir. 1988) (the moving party has the burden of clearly establishing the non-existence of any genuine issue of fact that is material to a judgment in its favor). Once this burden is discharged, if the record does in fact bear out that no genuine dispute exists, the burden then shifts to the non-moving party who must set forth affirmative evidence and specific facts showing there is a genuine dispute on that issue. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986). In determining whether the moving party has met its burden, all evidence and inferences are to be viewed in the light most favorable to the non-moving party. *Johnson v. Enron Corp.,* 906 F.2d 1234, 1237 (8th Cir. 1990). Where the moving party fails to satisfy its burden to show initially the absence of a genuine issue concerning any material fact, summary judgment must be denied even if no opposing evidentiary matter is presented. *Foster v. Johns-Manville Sales Corp.,* 787 F.2d 390, 393 (8th Cir. 1986).

FLSA

Blair's first claim is for wages under the FLSA. Under the FLSA, an employer must pay a minimum wage to its employees who work in activities covered by the Act. 29

U.S.C. § 206 (2004). Courts generally look to the economic reality of the situation to determine whether a school and its students are covered under the Act. *Bobilin v. Board of Educ.*, 403 F. Supp. 1095, 1108 (D. Haw. 1975). At least one court has found that the FLSA may be applicable to juveniles adjudged delinquent and placed under state supervision. *King v. Carey*, 405 F. Supp. 41, 44 (W.D.N.Y. 1975). The parties do not dispute Blair performed "chores" at both schools including laundry, hauling firewood, washing cars, performing automobile and bus maintenance, campus maintenance, repairing fences, digging and enlarging ponds, rounding up cattle of third parties, painting, replacing water pipes, and taking out trash. Pl.'s Dep. at 33-35 and errata sheet at 3-4. In his verified first amended complaint, Blair also states that he was forced to work thirty to forty hours per week on defendants' business operations and he was not paid for any of his labor. Compl. ¶¶ 191, 195. In response, the defendants do not state how many hours per week Blair performed his "chores." Sam Gerhardt, the pastor of Mountain Park, states that the curriculum of the schools is offered by Accelerated Christian Education and the chores are important for the students to learn teamwork and responsibility as well as develop pride and accomplishment. Defs.' Ex. L. ¶¶ 4-6. Gerhardt states that young men at both schools are responsible to do their own laundry, clean their dormitory, and mow and "weed-eat" lawns. Defs.' Ex. L. ¶ 5. He characterizes the time devoted to "other chores such as automobile cleaning and maintenance, cleaning brush, and painting" as occasional. *Id.* Palm Lane, without citing any evidentiary support, alleges that Blair performed various chores after prayers and education; and vaguely characterizes the frequency as "sometimes." Def. Palm Lane's Mot. Summ. J. at 5. Actions performed

"occasionally" and "sometimes" can be substantially different from actions performed thirty to forty hours per week over a five-month period.

The Court finds that there are genuine issues of material fact which preclude the entry of summary judgment on Blair's FLSA claim, including but not limited to whether Blair's chores at the schools were an integral part of the educational curriculum or part of defendants' business enterprises; the amount of time plaintiff spent completing the chores in relation to the time spent on his education; and whether the totality of the circumstances show that plaintiff's work should be compensated under FLSA. As a result, defendants' motions for summary judgment as to plaintiff's FLSA claim will be denied.

False Imprisonment Claim

Next, Plaintiff asserts a state law claim of false imprisonment. False imprisonment occurs when the plaintiff is confined by the wrongdoer without legal justification. *Hyatt v. Trans World Airlines, Inc.*, 943 S.W.2d 292, 299 (Mo. Ct. App. 1997). The following facts are not in dispute. Blair was born on November 17, 1984. Defs.' Ex. E at 7. In October 2001, Blair was 16 years old. On October 24, 2001, Blair was adjudged a juvenile delinquent and ordered to successfully complete in-patient residential treatment at Baptist Boys Academy in Missouri. Defs.' Ex. H. After Blair was adjudged a juvenile delinquent, Blair's parents, Ron and Jannett Blair temporarily delegated their parental authority to Bob Wills. Defs.' Ex. K. Blair was enrolled at Mountain Park from October 24, 2001 to November 9, 2001. Pl.'s Dep. at 27. Then, from November 10, 2001 until March 15, 2002, Blair was enrolled at Palm

Lane. Pl.'s Dep. at 31. In their respective declarations, Blair's parents state they consented to Blair attending Mountain Park and Palm Lane. Ron Blair Decl. ¶ 12, Jannett Blair Decl. ¶ 12. Blair's parents state that they understood Blair would be sent to Palm Lane after his enrollment at Mountain Park. Ron Blair Decl. ¶ 13, Jannett Blair Decl. ¶ 9. Blair contends that his parents' initial consent was not an informed consent because at their depositions they stated that if the claims alleged in Blair's complaint are true, they would not have enrolled him at Mountain Park and Palm Lane. Ron Blair Dep. at 30-31, Jannett Blair Dep. at 2, 24. Blair's argument that his parents' consent was uninformed fails because his parents admit that they knew he would attend both schools and consented to his enrollment at both. There cannot be an issue of genuine fact created based upon the Blairs' answer to a hypothetical question. The record does not show that Blair's parents withdrew their consent or claim that their consent was based on fraud or misrepresentation by the defendants. Blair does not provide any evidence to support his allegations that his parents' consent was invalid during his stay at Mountain Park and Palm Lane.

"Parents have a recognized liberty interest in the care, custody, and management of their children." *Whisman v. Rinehart,* 119 F.3d 1303, 1309 (8th Cir. 1997). A child's parents are his natural guardians and have the custody and care of the child's person and education. MO. REV. STAT. § 475.025 (2004). Parents can also give consent on behalf of their minor children. MO. REV. STAT. § 431.061 (2004) (statute authorizing parents to consent to medical treatment for minor child). Missouri courts have not addressed whether a private school or any institution may

be liable for false imprisonment when a custodial parent consents to the child's enrollment and confinement at the school. Parents have the right, however, to direct the upbringing and education of their children. *Doe "A" v. Special School Dist. of St. Louis County,* 637 F. Supp. 1138, 1146 (E.D. Mo. 1986). Based on the parents' fundamental right to educate their child, Blair's parents' consent, and no state guidance to the contrary, Blair cannot maintain an action against defendants for false imprisonment. *See R.J.D. v. The Vaughan Clinic,* 572 So.2d 1225, 1228-9 (Ala. 1990) (affirming dismissal of false imprisonment claim against psychiatric hospital where custodial parent had admitted child). Accordingly, the Court finds that defendants are entitled to summary judgment on Blair's claim for false imprisonment.

Battery

Blair's final claim is a state law claim for battery. Battery is an intended, offensive, bodily contact with another. *State v. Dowd,* 923 S.W.2d 444, 449 (Mo. Ct. App. 1996). Blair alleges in his verified first amended complaint that "[d]efendants and all of them have conspired together with the purpose and effect of causing multiple batteries upon the plaintiff. . . ." Am. Compl. ¶ 208. Defendants request summary judgment on Blair's battery claims against all defendants except Bo Gerhardt. Defendants cite Blair's deposition in support of their motion for summary judgment. In his deposition, Blair states Bo Gerhardt slammed him against a bathroom counter and wall at Mountain Park. Pl.'s Dep. at 59, 62-63. Defendants assert that the Court should dismiss the battery claims against all defendants except Bo Gerhardt, because

plaintiff does not allege batteries by any of the other defendants. Pl.'s Dep. at 62-63.

Blair contends that his claim against Bo Gerhardt was the first in a series of constant batteries against his person. Pl.'s Mem. in Opp'n at 2. Blair also asserts that his verified first amended complaint is sufficient for his allegations against the other defendants. Blair's verified complaint is the equivalent of an affidavit for purposes of summary judgment. *Roberson v. Hayti Police Dep't,* 241 F.3d 992, 994 (8th Cir. 2001). Although a party may not rest on his pleadings to create a fact issue sufficient to survive summary judgment, the facts alleged in a verified complaint need not be repeated in a responsive affidavit in order to survive summary judgment. *Roberson* at 995 (citing *Williams v. Adams,* 935 F.2d 960, 961 (8th Cir. 1991)). A conclusory affidavit which is devoid of specific factual allegations cannot preclude summary judgment. *Allen v. Entergy Corp.,* 181 F.3d 902, 905 (8th Cir. 1999) (citing *Flannery v. Trans World Airlines, Inc.,* 160 F.3d 425, 428 (8th Cir. 1998)), *cert. denied,* 120 S. Ct. 618 (1999). Blair's verified first amended complaint does not make specific allegations against any defendant. In Blair's deposition, he makes one specific allegation of battery against Bo Gerhardt. Pl.'s Dep. at 59. Blair has not submitted affirmative evidence or specific facts to support battery claims against the other defendants. Summary judgment is appropriate where there is no independent evidence, other than the nonmoving party's unsubstantiated allegations. *Pony Computer, Inc. v. Equus Computer Sys. of Missouri, Inc.,* 162 F.3d 991, 997 (8th Cir. 1998) (citing *Davenport v. Riverview Gardens School District,* 30 F.3d 940, 944 (8th Cir. 1994)). Therefore, the Court will grant defendants' motions for summary judgment on

Blair's state law claims of battery against Bob Wills, Betty Sue Wills, Sam Gerhardt, Deborah Gerhardt, Julie Gerhardt, Drew Parrish, Robert O'Briant, Robert Kennedy, and Palm Lane Baptist Church, Inc.[2]

Defendants request that Blair's battery claim against Bo Gerhardt be remanded to state court. Because the Court has denied defendants' motions for summary judgment as to Blair's FLSA claims, the Court will retain supplemental jurisdiction of the battery claim against Bo Gerhardt.

Conclusion

For the foregoing reasons, the Court will deny defendants' motions for summary judgment on Blair's FLSA claim. The Court will grant defendants' motions for summary judgment on Blair's state law claims of false imprisonment against all defendants and on plaintiff's battery

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[2] To the extent that Blair alleges a conspiracy regarding his claims of false imprisonment and battery, Blair's claims fail as a matter of law. A civil conspiracy is an agreement or understanding between persons to do an unlawful act or to use unlawful means to do a lawful act. *Oak Bluff Partners, Inc. v. Meyer*, 3 S.W.3d 777, 780-81. (Mo. 1999) (en banc). "In Missouri, if tortious acts alleged as elements of a civil conspiracy fail to state a cause of action, then the conspiracy claim fails as well." *Rice v. Hodapp*, 919 S.W.2d 240, 245 (Mo. 1996) (en banc). A claim of conspiracy must establish: (1) two or more persons; (2) with an unlawful objective; (3) after a meeting of the minds; (4) committed at least one act in furtherance of the conspiracy; and (5) the plaintiff was thereby damaged. *Id.* "Facts that, if true, constitute an unlawful act must be alleged as an element of the tort for a petition to state a civil conspiracy. Merely alleging the commission of wrongful acts is conclusory and insufficient to state a claim for civil conspiracy." *Mackey v. Mackey*, 914 S.W.2d 48, 50 (Mo. Ct. App. 1996). Blair's complaint asserts conclusions that were not supported by facts, therefore, any conspiracy claims fail as a matter of law.

claims against Bob Wills, Betty Sue Wills, Sam Gerhardt, Deborah Gerhardt, Julie Gerhardt, Drew Parrish, Robert O'Briant, Robert Kennedy, and Palm Lane Baptist Church, Inc.

Accordingly,

IT IS HEREBY ORDERED that defendants' motions for summary judgment are **GRANTED IN PART,** and **DENIED IN PART.** [Docs 87 and 90]. Defendants' motions for summary judgment as to Count V of plaintiff's first amended complaint are **DENIED.** Defendants' motions for summary judgment as to plaintiff's claim for false imprisonment are **GRANTED.** Defendants' motions for summary judgment as to plaintiffs' claims for battery against Bob Wills, Betty Sue Wills, Sam Gerhardt, Deborah Gerhardt, Julie Gerhardt, Drew Parrish, Robert O'Briant, Robert Kennedy, and Palm Lane Baptist Church, Inc., are **GRANTED.**

IT IS FURTHER ORDERED that the Court will retain jurisdiction over plaintiff's state law battery claim against Bo Gerhardt.

An appropriate partial judgment will accompany this memorandum and order.

/s/ Charles A. Shaw
CHARLES A. SHAW
UNITED STATES
DISTRICT JUDGE

Dated this 2nd day of March, 2004.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

JORDAN BLAIR, Plaintiff, v. BOB WILLS, BETTY SUE WILLS, SAM GERHARDT, DEBORAH GERHARDT, BO GERHARDT, JULIE GERHARDT, DREW PARRISH, ROBERT O'BRIANT, ROBERT KENNEDY, and PALM LANE BAPTIST CHURCH, INC., Defendants.	)	No. 1:02-CV-88 CAS

PARTIAL JUDGMENT AND
PARTIAL ORDER OF DISMISSAL

In accordance with the Memorandum and Order of this date and incorporated herein,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendants' motions for summary judgment as to plaintiff's claims for false imprisonment are **GRANTED.**

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that defendants' motions for summary judgment as to plaintiff's claims for battery against Bob Wills, Betty Sue Wills, Sam Gerhardt, Deborah Gerhardt, Julie Gerhardt, Drew Parrish, Robert O'Briant, Robert Kennedy, and Palm Lane Baptist Church, Inc., are **GRANTED.**

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that judgment is entered in favor of defendants and against plaintiff on Count VI of plaintiff's first amended complaint as to plaintiff's claims for false imprisonment.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that judgment is entered in favor of defendants Bob Wills, Betty Sue Wills, Sam Gerhardt, Deborah Gerhardt, Julie Gerhardt, Drew Parrish, Robert O'Briant, Robert Kennedy, and Palm Lane Baptist Church, Inc. and against plaintiff on Count VI of plaintiff's first amended complaint as to plaintiff's claims for battery.

IT IS FURTHER ORDERED that Count VI of plaintiff's first amended complaint against defendants Bob Wills, Betty Sue Wills, Sam Gerhardt, Deborah Gerhardt, Julie Gerhardt, Drew Parrish, Robert O'Briant, Robert Kennedy, and Palm Lane Baptist Church, Inc., is **DISMISSED with prejudice.**

/s/ Charles A. Shaw
CHARLES A. SHAW
UNITED STATES DISTRICT JUDGE

Dated this 2nd day of March, 2004.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

JORDAN BLAIR, Plaintiff, v. BOB WILLS dba MOUNTAIN PARK BOARDING ACADEMY, BETTY SUE WILLS dba MOUNTAIN PARK BOARDING ACADEMY, SAM GERHARDT dba MOUNTAIN PARK BOARDING ACADEMY, DEBORAH GERHARDT dba MOUNTAIN PARK BOARDING ACADEMY, BO GERHARDT dba MOUNTAIN PARK BOARDING ACADEMY, JULIE GERHARDT dba MOUNTAIN PARK BOARDING ACADEMY, DREW PARRISH dba MOUNTAIN PARK BOARDING ACADEMY, ROBERT O'BRIENT dba MOUNTAIN PARK BOARDING ACADEMY, ROBERT KENNEDY dba MOUNTAIN PARK BOARDING ACADEMY, PALM LANE BAPTIST CHURCH, INC., Defendants.	)	No. 1:02-CV-88 CAS

JUDGMENT

This action came for trial before an advisory jury, the undersigned United States District Judge presiding. Following the presentation of plaintiff's evidence, the

defendants moved for judgment as a matter of law on the Fair Labor Standards Act ("FLSA") claim. The Court denied that motion and defendants renewed their motion at the close of all the evidence, as to the FLSA claim. The Court granted the defendants' motion for judgment as a matter of law at the close of all the evidence.

Plaintiff Jordan Blair claimed that he was forced to work without pay for defendants in violation of the FLSA. In his verified amended complaint, Blair alleged that he was forced to work without pay for approximately forty hours per week at defendants' business enterprises. At the time of the alleged events, Blair was enrolled as a student at Mountain Park Boarding Academy and Palm Lane Boarding Academy. Under the FLSA, an employer must pay a minimum wage to its employees who work in activities covered by the Act. 29 U.S.C. § 206 (2004). Courts generally look to the economic reality of the situation to determine whether a school and its students are covered under the Act. *Bobilin v. Board of Educ.*, 403 F. Supp. 1095, 1108 (D. Haw. 1975).

At trial, judgment was entered for defendants because based on all the evidence in the record, there was no legally sufficient evidentiary basis to find for the plaintiff on the FLSA claim. *See Phillips v. Collings*, 256 F.3d 843, 847 (8th Cir. 2001) (quoting Fed. R. Civ. P. 50(a)). The parties do not dispute Blair lived on the school grounds and performed "chores" at both schools including laundry, hauling firewood, washing cars, performing automobile and campus maintenance, repairing fences, painting, and taking out trash. The evidence at trial demonstrated that Blair's chores were an integral part of the educational curriculum of Mountain Park and Palm Lane and were primarily for the benefit of the plaintiff. The chores

performed by Blair have an economic value to the school because they save the school the cost of hiring others to perform the chores. Looking at the totality of the entire economic situation, however, it cannot be said as a matter of law that these economically valuable activities could reasonably be considered employment under the FLSA, which would require the schools to pay minimum wages to its students. *Bobilin,* 403 F. Supp. at 1108. Viewing all the evidence in the light most favorable to Blair and drawing all reasonable inferences in his favor, the evidence clearly shows Blair was not an employee of defendants and is susceptible of no reasonable inference sustaining that position. *Kingserlow v. CMI Corp.,* 217 F.3d 1021, 1025 (8th Cir. 2000) (citing *Reeves v. Sanderson Plumbing Prods., Inc.,* 120 S. Ct. 2097, 2110 (2000)).

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that judgment as a matter of law pursuant to Rule 50(a) be entered against plaintiff Jordan Blair and in favor of defendants Bob Wills, Betty Sue Wills, Sam Gerhardt, Deborah Gerhardt, Bo Gerhardt, Julie Gerhardt, Drew Parrish, Robert O'Brient, Robert Kennedy, and Palm Lane Baptist Church, Inc. on plaintiff's claim under the Fair Labor Standards Act, 29 U.S.C. § 206 and that plaintiff's claims be dismissed on the merits.

/s/ Charles A. Shaw
CHARLES A. SHAW
UNITED STATES DISTRICT JUDGE

Dated this 14th day of April, 2004.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

JORDAN BLAIR,	)	
	)	
Plaintiff,	)	No. 1:02-CV-88 CAS
v.	)	
	)	
BOB WILLS, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

This matter is before the Court on defendant Bo Gerhardt's motion for a new trial and all defendants' motions to amend the judgment to conform to 28 U.S.C. § 1332 and Federal Rule of Civil Procedure 54. For the following reasons, the motions will be denied.

Procedural Background

Plaintiff Jordan Blair filed this case against defendants alleging violation of his constitutional rights under 42 U.S.C. §§ 1983, 1985, and violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201, et seq. Blair also alleged state law tort claims of battery and false imprisonment. The Court dismissed the constitutional claims under 42 U.S.C. §§ 1983 and 1985. Order of December 2, 2002. The Court dismissed plaintiff's state law claims of false imprisonment and plaintiff's battery claims against all defendants except defendant Bo Gerhardt on defendants' summary judgment motions. Order of March 2, 2004. On April 12, 2004, a jury trial was held on plaintiff's FLSA claim and remaining battery claim. At the close of the evidence, the Court granted defendants'

motion for judgment as a matter of law as to plaintiff's FLSA claim. Plaintiff's battery claim was submitted to the jury. The jury returned a verdict in plaintiff's favor in the amount of $20,000.00.

Bo Gerhardt asserts that the jury's verdict is against the weight of the evidence and plaintiff's counsel's improper conduct and remarks prejudiced him during trial. All of the defendants ask the Court to amend the clerk's judgment to conform to 28 U.S.C. § 1332 and Federal Rule of Civil Procedure 54 or retax costs. Defendants contend that the defendants substantially prevailed on the claims against them and it would be unfair to tax Bo Gerhardt with all of the costs.

Standard

It is almost entirely within the discretion of the trial court whether to grant a new trial. *See* Federal Rule of Civil Procedure 59(a); *Citizens Bank of Batesville, Arkansas v. Ford Motor Co.*, 16 F.3d 965, 967 (8th Cir. 1994). "A new trial is appropriate when the first trial, through a verdict against the weight of the evidence, an excessive damage award, or legal errors at trial, resulted in a miscarriage of justice." *Gray v. Bicknell*, 86 F.3d 1472, 1480 (8th Cir. 1996). In reviewing a motion for a new trial on the ground that the jury's verdict is against the weight of the evidence, the Court is free to weigh the evidence for itself and grant a new trial even where substantial evidence exists to support the verdict. *Dominium Mgmt. Svcs., Inc. v. Nationwide Housing Group*, 195 F.3d 358, 366 (8th Cir. 1999); *see White v. Pence*, 961 F.2d 776, 780 (8th Cir. 1992). "Ultimately, the district court must determine if there will be a miscarriage of justice if the jury's

verdict is allowed to stand." *Id.* (citing *White,* 961 F.2d at 780). A miscarriage of justice occurs when there is insufficient evidence to support the verdict. *Douglas County Bank & Trust Co. v. United Financial Inc.*, 207 F.3d 473, 478 (8th Cir. 2000).

Discussion

At trial, Blair testified that Bo Gerhardt shoved him into a wall. Bo Gerhardt contends that the jury's verdict for Blair on this claim is against the weight of the evidence presented at trial. First, Bo Gerhardt states that the only evidence to support the verdict is the testimony of Blair. Second, he asserts that Blair testified that he did not report the battery and suffered no physical harm. Also, Blair testified that Drew Parrish and Matt Elmore witnessed the battery. Third, Bo Gerhardt testified that he never shoved Blair into a wall and Drew Parrish testified he did not witness Bo Gerhardt strike Blair. Additionally, he asserts that the defense put on evidence that Mountain Park policy prohibited staff members from touching or disciplining students. Bo Gerhardt contends that the weight of the evidence favors him and the jury's verdict should be overturned. Blair asserts that a reasonable jury could credit Blair's testimony over the testimony of the defense witnesses.

"In determining whether a verdict is against the weight of the evidence, the trial court can rely on its own reading of the evidence – it can 'weigh the evidence, disbelieve witnesses, and grant a new trial even when there is substantial evidence to sustain the verdict'." *White,* 961 F.2d at 780 (citations omitted). "The district court, however, may not reweigh the evidence and set

aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because [the judge feels] other results are more reasonable." *Id.* (citations omitted). If the subject matter of the litigation is simple, there is no complicated evidence, or where the legal issues presented would not confuse the jury, the court should be reluctant to grant a new trial. *Fireman's Fund Ins. Co. v. Aalco Wrecking Co.*, 466 F.2d 179, 187 (8th Cir. 1972), *cert. denied*, 410 U.S. 930 (1973).

Based on the evidence presented at trial, the Court finds that the jury's verdict was not against the weight of the evidence. The battery claim involved the conflict of simple testimony and turned on the credibility of the witnesses. The Court observed the testimony and demeanor of the witnesses during trial. A reasonable jury could disbelieve the testimony of Bo Gerhardt and Drew Parrish and believe Blair's testimony. "The choice between the two versions of events is essentially a credibility determination for a jury rather than a weight of the evidence issue" *White*, 961 F.2d at 781 (citing *Goldsmith v. Diamond Shamrock Corp.*, 767 F.2d 411, 416 (8th Cir. 1985). Allowing the jury verdict to stand would not be a miscarriage of justice because there is sufficient evidence to support the verdict.

Statements and Conduct of Plaintiff's Counsel

Next, Bo Gerhardt asserts that plaintiff's counsel, Mr. Stilley, attempted to raise issues that the Court previously ruled inadmissible during the final pre-trial conference. He alleges that the statements and conduct of Mr. Stilley prejudiced the jury despite repeated admonishments from the Court. Mr. Stilley argues that through forgetfulness or

oversight, he may have asked objectionable questions, but that the Court's admonishments and instructions were sufficient.

For a violation of an in limine order to warrant a new trial, the order must be specific in its prohibition, the violation must be clear, and the violation must prejudice the parties or deny them a fair trial. *Pullman v. Land O'Lakes, Inc.*, 262 F.3d 759, 762 (8th Cir. 2001). The Court notes that plaintiff's counsel had to be admonished numerous times during the trial, however, the Court believes that Bo Gerhardt was not prejudiced or denied a fair trial. The Court promptly admonished plaintiff's counsel and gave the jury curative instructions regarding any potentially damaging statements by counsel. The Court believes that these measures were sufficient to prevent any prejudice that may have occurred without them.

Remittitur

In the alternative, defendant Bo Gerhardt requests that the Court offer Blair a remittitur of the damage award because it was excessive and against the weight of the evidence. Remittitur is appropriate only when a jury's award "is so excessive as to shock the Court's conscience." *C.L. Maddox, Inc. v. Benham Group, Inc.*, 88 F.3d 592, 603 (8th Cir. 1996) (citing *Triton Corp. v. Hardrives, Inc.*, 85 F.3d 343, 347 (8th Cir. 1996)). State law substantive standards that do not conflict with the commands of the Seventh Amendment must be followed in reviewing jury verdicts in diversity cases. Whether to grant a remittitur, however, "is a procedural matter governed by federal, rather than state, law." *Schaefer v. Spider Staging Corp.*,

275 F.3d 735, 738 (8th Cir. 2002) (citing *Gasperini v. Center for Humanities*, 518 U.S. 415, 426-38 (1996), and quoting *Parsons v. First Investors Corp.*, 122 F.3d 525, 528 (8th Cir. 1997)).

The Court finds that a remittitur is inappropriate in this case. Although the jury could have awarded Blair nominal damages because he suffered no physical injury, Bo Gerhardt has not submitted any evidence to show that a $20,000 award for a battery is so excessive as to shock the Court's conscience. Therefore, the court declines to use its discretion and grant a remittitur.

Costs under 28 U.S.C. § 1332(b)

28 U.S.C. § 1332(b) states that

> Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

Defendants allege that the Court should deny plaintiff costs and award costs to the defendants because plaintiff made a frivolous attempt to assert federal jurisdiction, failed to prevail on any of his federal claims, and received a verdict of only $20,000. Section 1332(b) permits, but does not require, the district court to deny costs when a plaintiff's recovery is less than the jurisdictional amount.

Mimaco LLC v. Maison Faurie Antiquities, 221 F.3d 1352, 1357 (10th Cir. 2000) (trial court could grant plaintiff costs despite award of $20,000 on state law claim) (unpublished). Therefore, the Court will not amend the judgment pursuant to 28 U.S.C. § 1332 and deny plaintiff costs.

Costs under Federal Rule of Civil Procedure 54(d)

As a threshold matter, it is presumed that a prevailing party is entitled to costs. *See* Federal Rule of Civil Procedure 54(d); *Bathke v. Casey's General Stores, Inc.,* 64 F.3d 340, 347 (8th Cir. 1995). The Court recognizes that it has discretion to deny costs to the prevailing party, even in the absence of misconduct by that party. *See Greaser v. State of Mo., Dept. of Corrections,* 145 F.3d 979, 985 (8th Cir. 1998); *Hibbs v. K-Mart Corp.,* 870 F.2d 435, 443 (8th Cir. 1989) (discussing discretionary nature of cost award under Rule 54(d) and 28 U.S.C. § 1920).

Defendants argue because plaintiff did not proceed on the majority of his claims, the Court must consider whether the costs sought are reasonable in relation to the success achieved. *See Hensley v. Eckerhart,* 461 U.S. 424, 426 (1983) and *Arneson v. Callahan,* 128 F.3d 1243, 1248 (8th Cir. 1997). Defendants assert that plaintiff's costs should be reduced, because he received only one half of one percent (0.5%) of his total monetary claim and prevailed on part of one count of a six count complaint. Further, the defendants argue most of them prevailed on all six claims and it would be unfair to tax defendant Bo Gerhardt, who lost on the sixth count, with the costs for the entire action. Defendants' argument concerning plaintiff's limited success confuses the standards to be applied in awarding costs under Rule 54(d), applicable here, and under civil

rights fee-shifting statutes such as 42 U.S.C. § 1988 or Title VII, as applied in *Hensley* and *Arneson*. While extremely limited success may be considered a factor in determining whether costs should be awarded under Rule 54(d), *see Farrar v. Hobby*, 506 U.S. 103, 120 (1992) (observing that courts have denied costs under Rule 54(d) "where the victory was purely technical"), the Court is not required to reduce plaintiff's cost award based on his limited success. *See, e.g., Institutionalized Juveniles v. Secretary of Public Welfare*, 758 F.2d 897, 926 (3rd Cir. 1985) (stating that limited success does not justify the penalty of a denial of costs). In the exercise of its discretion, the Court concludes that plaintiff, as a prevailing party against defendant Bo Gerhardt, is entitled to an award of his taxable costs against this defendant under Rule 54(d). The Court will address Bo Gerhardt's objections to the bill of costs submitted by Blair when the matter has been fully briefed.

Conclusion

For the foregoing reasons, defendant Bo Gerhardt's motion for a new trial is denied. Defendants' motions to amend the judgment to conform to 28 U.S.C. § 1332(b) and Federal Rule of Civil Procedure 54(d) are denied.

Accordingly,

IT IS HEREBY ORDERED that defendant Bo Gerhardt's motion for a new trial is **DENIED.** [Doc. 157]

IT IS FURTHER ORDERED that defendants' motion to amend judgment to conform to Federal Rule of Civil Procedure 54 is **DENIED.** [Doc. 154]

IT IS FURTHER ORDERED that defendants' motion to amend judgment to conform to 28 U.S.C. § 1332 is **DENIED.** [Doc. 155]

/s/ Charles A. Shaw
CHARLES A. SHAW
UNITED STATES
DISTRICT JUDGE

Dated this 8th day of June, 2004.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

JORDAN BLAIR, Plaintiff, v. BOB WILLS, AKA BOBBY RAY WILLS, AKA W. B. WILLS, BETTY SUE WILLS, SAM GERHARDT, DEBORAH GERHARDT, BO GERHARDT, JULIE GERHARDT, DREW PARRISH, BILL CAVITT, ROBERT O'BRIENT, AARON SMITH, ROBERT KENNEDY and MIKE PARDOS, DBA "MOUNTAIN PARK BOARDING ACADEMY," and PALM LANE BAPTIST CHURCH INC.,[1] Defendants.	)	Case No. 1:02-CV-88 CAS

MEMORANDUM AND ORDER

(Filed Dec. 2, 2002)

This matter is before the Court on several pretrial motions, including a motion for a preliminary injunction, and a request in plaintiffs Amended Complaint for certification of

[1] The Missouri Association of Christian Child-Care Agencies, Inc., was named as a defendant in the initial complaint, but not in the first amended complaint. As noted in the body of this Memorandum and Order, plaintiff has consented to the granting of summary judgment to this party.

a class. Jordan Blair, born November 17, 1984, commenced this action on July 2, 2002. The gravamen of the complaint is the alleged mistreatment Blair received at two related boarding schools to which he was sent after being adjudicated a juvenile delinquent by the Juvenile Division of the Circuit Court of Crawford County, Arkansas. On September 26, 2002, Blair filed a motion for the appointment of Susanne Blicharz as his next friend and an amended complaint "by his next friend Susanne Blicharz." Blair asserts in the amended complaint that the Court has subject matter jurisdiction under 42 U.S.C. §§ 1983, 1985, and 1988, and under the Fair Labor Standards Act, 29 U.S.C. § 201, et seq. He also asserts diversity jurisdiction under 28 U.S.C. § 1332, as he is a citizen of Arkansas, and no defendants share this citizenship, and supplemental jurisdiction over his state tort claims of battery and false imprisonment.

The record establishes that on October 24, 2001, the Juvenile Division of the Circuit Court of Crawford County ordered Blair, as a condition of probation, to "successfully complete inpatient/residential treatment at Baptist Boys Academy in Missouri (or like facility). Said Juvenile is hereby ordered to comply with all rules and regulations set by said faculty during said placement period and follow all after-care recommendations made by said facility upon discharge." Blair was immediately transported by a sheriffs deputy to Palm Lane Boarding Academy in Florida. On November 9, 2001, he transferred to Mountain Park Boarding Academy in Missouri, where he remained until March 15, 2002, when he "escaped."[3] Blair alleges

[3] It is not entirely clear from the record which school Blair attended first. In the amended complaint he states that he was taken

(Continued on following page)

that the Palm Lane Baptist Church, Inc., and the Wills and Gerhardt defendants own and/or operate both schools. The other individual defendants (Parrish, Cavitt, O'Brient, Smith, and Kennedy) are staff members at one or both of the schools.

Blair alleges that he and the approximately 200 other students at the schools were physically and emotionally abused on a regular basis, pursuant to defendants' policies. He alleges that he and the other students were, among other things, denied reasonable bathroom privileges resulting in boys urinating and defecating in their clothing and sustaining urinary tract infections; subjected to systematic sleep deprivation; forced to take part in born again Christian religious services; encouraged to assault and torment other students; and forced to work without pay in defendants' profit-making cattle operation. He also alleges that all of the students' mail and telephone calls were censored for any complaints about their treatment.

Blair claims that these actions constituted (1) a conspiracy to deprive him and the other students of their constitutional rights, including the right to counsel and appellate review, the right not to be subjected to cruel and unusual punishment, and the rights guaranteed by the First Amendment, all in violation of 42 U.S.C. §§ 1983 and 1985 (Counts 1-4); a violation of FLSA by failing to pay Blair and the other students minimum wage and overtime for work they were forced to do (Count 5); and the state law torts of battery and false imprisonment (Count 6).

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from the Arkansas court to the school in Florida and remained there through November 9, 2001; in his response (Doc. 19) to defendants' motions to dismiss for lack of personal jurisdiction, he states that he was at Mountain Park Boarding School during that period of time.

Blair seeks to have the other students at the schools (or on escape status) certified as a class. He alleges that his treatment at the schools have caused him lasting psychological problems and he seeks compensatory damages of $1,250,000, as well as injunctive relief enjoining defendants from engaging in the challenged practices. Blair cites two cases involving abuses at similar schools run by defendant Bob Wills, *Candy H. v. Redemption Ranch, Inc.* 563 F. Supp 505 (D. Ala. 1983),[3] and *In re M. I., a Minor,* 519 So. 2d 433 (Miss. 1988).[4]

Motions to Dismiss for Lack of Subject Matter Jurisdiction

Two different groups of defendants have filed separate motions to dismiss this action for lack of subject matter jurisdiction (Docs. 19 and 27). They argue that Blair has not set forth any state action, and hence this Court lacks subject matter jurisdiction over Blair's claims under 42 U.S.C. § 1983. Attached to one of the motions is the affidavit, dated September 25, 2002, of defendant Sam Gerhardt, superintendent of the Mountain Park Baptist Academy in Missouri. He attests that the school accepts no government funds or referrals. Rather, the school, whose aim is "the salvation and Christian education" of its

[3] An action claiming civil rights conspiracy, false imprisonment, assault, and battery, brought by unwed pregnant girls sent to a home for girls operated by Bob Wills where strict rules were enforced by corporal punishment.

[4] Affirmance of adjudication of Bob Wills to be in contempt of court for failing to comply with injunctions precluding the removal of minors from a residential facility he operated, and ordering him to provide a list of the minors residing there with documentation that they were being lawfully held.

students, accepts students only upon the application of parents accompanied by the payment of fees and tuition. At the request of parents, the school will send reports to government agencies including the courts. The affidavit also states that because Blair "violated our trust, and because of his age, he is not eligible for readmission to Mountain Park Baptist Academy." Also attached to the motion is a copy of Blair's parents' enrollment of Blair into the Academy, dated October 20, 2001.

The Court first notes that defendants' arguments go to whether Blair states a claim under § 1983 and not to the question of subject matter jurisdiction. The Court will therefore construe the motions, at least in part, as motions to dismiss for failure to state a claim. The Court agrees with defendants that Blair has not shown state action, as required for a suit against them under § 1983. *See Adams v. Boy Scouts of Am.-Chickasaw Council,* 271 F.3d 769, 777-78 (8th Cir. 2001) (a showing of state action is required to state a claim under § 1983). Where the state "has so far insinuated itself into a position of interdependence with a private party" or where there is a "sufficiently close nexus between the state and the challenged action," the state must be recognized as a joint participant in the challenged activity which therefore cannot be considered purely private. *Id.* Here, the Arkansas court's order did not place Blair in the defendant schools, but left the choice of school up to his parents, and there is no allegation of any state regulation of defendants. The Court concludes that under these circumstances, state action cannot be imputed to any of the defendants. *Cf. id.* (fact that state police removed an allegedly disruptive individual in response to call for assistance from defendant did not render defendant a state actor for purposes of § 1983 liability). This

ruling renders moot defendants' motion for an order compelling Arkansas officials to provide affidavits concerning the details of Blair's sentencing.

The Court also concludes that Blair has failed to state a claim under 42 U.S.C. § 1985(3), because he is not a member of a class protected by that statutory provision. *See Larson v. Miller,* 55 F.3d 1343, 1352 (8th Cir. 1995) (§ 1985(3)'s protection against civil conspiracies motivated by invidiously discriminatory animus extends beyond racial classes to the handicapped, females and "other suspect-like classes"). Accordingly, Blair's claims under 42 U.S.C. § 1983 and 1985(3) will be dismissed for failure to state a claim.

These conclusions do not deprive the Court of subject matter jurisdiction over the remaining state law claims. Blair asserts diversity of citizenship, as well as damages in access of the $75,000 jurisdictional amount set forth in 28 U.S.C. § 1332. Furthermore, at this state of the proceedings, the Court is reluctant to conclude that plaintiff cannot state a claim under FLSA. *See Tony & Susan Alamo Found. v. Secretary of Labor,* 471 U.S. 290, 298-99 (1985) (commercial activities of religious foundation were within the definition of "enterprise" under FLSA despite contention that the businesses ministered to the needs of the workers by providing them with rehabilitation, food, and shelter, and were infused with a religious purpose); *Reich v. Shiloh True Light Church of Christ,* 85 F.3d 616, 1996 WL 228802, at *3 (4th Cir. 1996) (unpublished per curiam) (church youth under the age of 16 who did construction work as participants in the church's vocational training program were "employees" under FLSA), Defendants' motions to dismiss the action for lack of subject matter jurisdiction will be denied.

Motions to Dismiss and to Quash Service of Process for Lack of Personal Jurisdiction

There are two motions to dismiss and quash service of process for lack of personal jurisdiction before the Court – a joint motion filed by defendants Kennedy, Parish, and Betty Sue Wills, and a separate motion filed by Palm Lane Baptist Church, Inc. The individual defendants assert that they are citizens of Florida and have had no contacts with Blair in Missouri. Parish has submitted an affidavit stating that he is an employee of Palm Lane Baptist Church, Inc., and a staff member at the school in Florida. He states that he never traveled to Missouri "for the purpose of conducting business." Kennedy has also submitted a similar affidavit. He attests that his only contact with Blair was in Florida, Palm Lane Baptist Church, Inc., asserts that it is a not-for-profit Florida corporation with no contacts in Missouri.

In response to the motions to dismiss, Blair has submitted evidence which establishes that staff members, including Kennedy and Parish, are regularly transferred from school to school, and that both schools are closely interrelated in ownership and operation. He has also submitted evidence establishing that Palm Lane Baptist Church, Inc., and Betty Sue Wills are involved in the operation of the school in Missouri.

When personal jurisdiction is challenged, the plaintiff has the burden to show that jurisdiction exists. *Burlington Indus., Inc. v. Maples Indus.*, 97 F.3d 1100, 1102 (8th Cir. 1996). Nevertheless, to defeat a motion to dismiss for lack of personal jurisdiction before trial or an evidentiary hearing on the jurisdictional issue, the plaintiff need only make a prima facie showing of jurisdiction. *Dakota Indus., Inc. v. Dakota Sportswear, Inc.*, 946 F.2d 1384, 1387 (8th

Cir. 1991). Furthermore, if the Court relies on affidavits and other evidence to rule on the motion, the Court must look at the facts in the light most favorable to the plaintiff as the nonmoving party. *Id.*

In a diversity action, a federal court may assume jurisdiction over a nonresident defendant only to the extent permitted by the long-arm statute of the forum state and by the due process clause of the Fourteenth Amendment. *Porter v. Berall*, 293 F.3d 1073, 1075 (8th Cir. 2002); *see also Aviles v. Kunkle*, 978 F.2d 201, 204 (5th Cir. 1992) (per curiam) (same standard applies to a claim under FLSA). Missouri's long-arm statute authorizes jurisdiction over foreign corporations to the fullest extent allowed by constitutional due process; therefore, the two requirements merge into the single question of whether the exercise of personal jurisdiction comports with due process. *Porter*, 293 F.3d at 1075.

Due process requires "minimum contacts" between the non-resident defendant and the forum state *such that* "maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). There are two types of personal jurisdiction – general and specific. General jurisdiction arises when a defendant's contacts with the forum state are so "continuous and systematic" that defendant may be subject to suit there for causes of action entirely distinct from the in-state activities; specific jurisdiction exists when the defendant "has purposefully directed his activities at residents of the forum, and the litigation results from alleged injuries that arise out of or relate to those activities." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (quoted cases omitted); *Burlington Indus., Inc.*, 97 F.3d at 1103 ("specific

jurisdiction refers to jurisdiction over causes of action arising from or related to a defendant's actions within the forum state while general jurisdiction refers to the power of a state to adjudicate any cause of action involving a particular defendant, regardless of where the cause of action arose").

Upon review of the record, the Court first concludes that Blair has established a prima facie case of this Court's specific personal jurisdiction over defendants Betty Sue Wills's and Palm Lane Baptist Church, Inc. The record indicates that these two defendants own and/or operate both schools, the one in Missouri as well as the one in Florida. Thus their contacts with Missouri are directly related to this action. The Court notes that jurisdiction over Betty Sue Wills is not based solely on status in Palm Lane Baptist Church, Inc., but rather upon her alleged direct personal involvement in decisions which were causally related to Blair's alleged injuries.

With respect to defendants Kennedy and Parish, the issues are more complicated. Blair has not established a prima facie case of the Court's general jurisdiction over these defendants based on their contacts with Missouri – spending limited amounts of time as staff members at the school in Missouri. Furthermore, these two defendants have established that their contacts with Missouri are not directly related to Blair's claims against them for battery and false imprisonment. Specific jurisdiction over these defendants thus does not appear to exist.

As noted above, however, Blair seeks to represent all students at the schools and seeks injunctive relief on behalf of the class. Blair's evidence indicates that staff members routinely transfer between the two schools. If the

class Blair seeks to represent is certified with Blair as the class representative, injunctive relief against Kennedy and Parish might well be appropriate based on Blair's allegations that they directly engaged in physical and emotional abuse of putative class members. The Court believes the best course of action is to reserve ruling on Kennedy and Parish's motion to dismiss for lack of personal jurisdiction until the class certification matters are resolved. Lastly, the Court notes that although these two motions state in their title that they are also motions to quash service of process under Federal Rule of Civil Procedure 12(b)(3), no grounds or arguments are set forth for dismissing the moving defendants for improper venue. Accordingly, this aspect of the motions will also be denied.

Request for Class Certification

Blair's individual claim for injunctive relief is now moot, as he is no longer at either of the schools and defendants have represented that he will not be accepted back as a student. The Court concludes that he, nevertheless, has standing to pursue the issue of certification of the class of students who are or may be subjected to the challenged practices. In *Sosna v. Iowa*, 419 U.S. 393 (1975), the Supreme Court recognized that

> there may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion. In such instances, whether the certification can be said to 'relate back' to the filing of the complaint may depend upon the circumstances of the particular case and especially the

> reality of the claim that otherwise the issue would evade review.

Sosna, 419 U.S. at n. 11.

The present case presents just such a situation in which it may realistically be very difficult for a plaintiff to keep an injunctive claim alive long enough to seek lasting relief on behalf of others. As explained in *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1990), the mootness doctrine, especially in the context of putative class suits, is flexible and not a "legal concept with a fixed content or susceptible of scientific verification." *Id.* at 401 (action brought on behalf of class does not become moot upon expiration of the named plaintiffs substantive claim, even though class certification has been denied; if the named plaintiffs appeal results in reversal of the class certification denial, and a class subsequently is properly certified, the named plaintiff may adjudicate the merits of the class claim).

Blair will, accordingly, be allowed to pursue class certification and representation. *See Candy H.*, 563 F. Supp. at 518 (in action by girls challenging treatment at a school, named plaintiffs permitted to pursue class certification even though their claims for injunctive relief became moot after they filed the complaint). A separate order shall be issued on this date on these matters.

Motion for a Temporary Restraining Order and a Preliminary Injunction

Blair's request for a temporary restraining order and a preliminary injunction enjoining defendants from searching for him and forcing him to return to one of their schools is moot in light of their representations that they

would not accept him back as a student. Blair's request for injunctive relief on behalf of other members of the putative class must await further proceedings on class certification in accordance with this Court's Order to be issued on this date on matters relating to class certification.

Accordingly,

IT IS HEREBY ORDERED that plaintiff's motion to appoint Susanne Blicharz as next friend is **DENIED** as moot as plaintiff has now reached the age of majority. [Doc. 25]

IT IS FURTHER ORDERED that defendants' motion for reconsideration of the order admitting Oscar Stilley pro hac vice is **DENIED**. [Doc. 26]

IT IS FURTHER ORDERED that defendants' motion to dismiss for want of subject matter jurisdiction is **DENIED**. [Doc. 9]

IT IS FURTHER ORDERED that defendant Missouri Association of Christian Child Care Agencies, Inc.'s motion for summary judgment is **GRANTED**, upon plaintiff's representation that he does not oppose the granting of this motion. [Doc. 20]

IT IS FURTHER ORDERED that the motions of defendant Betty Sue Wills and Palm Lane Baptist Church, Inc., to dismiss for want of personal jurisdiction and to quash service of process are **DENIED**. [Doc. 19; Doc. 19 remains pending as to defendants Drew Parish and Robert Kennedy].

IT IS FURTHER ORDERED that defendants' supplemental motion to dismiss for want of subject matter jurisdiction is **DENIED**. [Doc. 27]

IT IS FURTHER ORDERED that defendants' motions to dismiss for want of subject matter jurisdiction, construed as motions to dismiss for failure to state a claim, are **GRANTED** with respect to plaintiff's claims under 42 U.S.C. § 1983 and 1985(3). [Docs. 19 and 27]

IT IS FURTHER ORDERED that defendants' motion for affidavits is **DENIED**. [Doc. 23]

/s/ Charles A. Shaw
CHARLES A. SHAW
UNITED STATES
DISTRICT JUDGE

Dated this 2nd day of December, 2002.

United States District Court
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

JUDGMENT IN A CIVIL CASE
(Filed Apr. 14, 2004)

JORDAN BLAIR

Plaintiff(s),

v.

CASE NUMBER:
1:02CV88CAS

BO GERHARDT

Defendant(s).

☒ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ Directed Verdict. This action came before the Court for a trial by jury, the Court having sustained defendant's motion for judgment as a matter of law at the close of plaintiffs' case;

☐ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that on plaintiff Jordan Blair's claim against defendant Bo Gerhardt, Judgment is entered in the amount of $20,000.00 in favor of plaintiff Jordan Blair and against defendant Bo Gerhardt. Court costs are assessed against defendant.

James G. Woodward
CLERK

April 14, 2004
DATE

By: Cathy Gould
Cathy Gould
DEPUTY CLERK

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 04-2434/2539/2540

Jordan Blair,	* Order Denying
Appellant/Cross-Appellee,	* Petition for Rehear-
	* ing and for Rehear-
v.	* ing En Banc
	*
Bob Wills, etc., et al.,	*
	*
Appellees/Cross-	*
Appellants.	*

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

September 29, 2005

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

No. 05-845

FEB 2 - 2006

IN THE

Supreme Court of the United States

JORDAN BLAIR,

Petitioner,

v.

BOB WILLS, A/K/A BOBBY RAY WILLS, A/K/A W.B. WILLS, BETTY SUE WILLS, SAM GERHARDT, BO GERHARDT, DEBORAH GERHARDT, JULIE GERHARDT, DREW PARRISH, ROBERT O'BRIENT, ROBERT KENNEDY, D/B/A MOUNTAIN PARK BOARDING ACADEMY, AND PALM LANE BAPTIST CHURCH, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Did the U.S. Court of Appeals for the Eighth Circuit err in affirming the district court's ruling that Petitioner could not maintain a civil rights claim under 42 U.S.C. § 1983 (2000), because the undisputed facts showed that Respondents were not acting under color of state law when caring for Petitioner while he was at Respondents' private boarding schools, and that Petitioner was enrolled at Respondents' private boarding schools by his parents?

(2) Did the U.S. Court of Appeals for the Eighth Circuit err in affirming the district court's ruling that Petitioner's performance of chores while at Respondents' boarding schools did not constitute "employment" under the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.* (2000)?

(3) Did the U.S. Court of Appeals for the Eighth Circuit err in affirming the district court's ruling that Petitioner could not maintain a state law claim for false imprisonment against Respondents for keeping Petitioner at their boarding schools, when the admissible evidence below established that Petitioner was a minor during the time of enrollment and Petitioner's parents desired and consented to Petitioner's enrollment with Respondents?

STATEMENT UNDER RULE 29.6

In accordance with United States Supreme Court Rule 29.6, Respondent Palm Lane Baptist Church, Inc. states that it has no parent company, and no publicly held company has any interest in it.

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STATEMENT OF THE CASE

The "facts" recited in Petitioner's Statement of the Case bear little resemblance to the record before the district court and United States Court of Appeals for the Eighth Circuit ("Eighth Circuit").

Mountain Park Baptist Church ("Mountain Park") was an independent Baptist church established by Respondent Bob Wills and his wife, Respondent Betty Sue Wills, in 1987. The ministry of Mountain Park was to serve troubled teens through the operation of a boarding academy emphasizing a secure, structured and disciplined Christian environment. The ministry grew to include Respondent Palm Lane Baptist Church. Respondents never received or accepted any funds from the state or federal government. Respondents never accepted students from a referral by a state or federal agency. Respondents only accepted students who were enrolled by their parents.

Petitioner was not enrolled with Respondents by the Arkansas juvenile court as he contends. Rather, he was adjudicated a juvenile delinquent by the Circuit Court of Crawford County, Arkansas. The court placed Petitioner on probation and, as a condition of probation, he was ordered to complete a 12-month program of rehabilitation at a "Baptist boys academy in Missouri (or like facility)." The juvenile court did not specify a school that Petitioner had to attend. Rather, it was Petitioner's parents, Ron and Jannett Blair, who were to decide where their son would complete the probation.

At the time of Petitioner's delinquency hearing, his parents had already applied to enroll Petitioner with Respondents. Petitioner's parents desired that Petitioner be

enrolled with Respondents. Petitioner's parents consented to enroll Petitioner with Respondents. Petitioner's parents paid for his enrollment, not the state.

While enrolled with Respondents, all students including Petitioner went to school. All students also performed chores on campus including doing their laundry, cleaning their dormitory, mowing lawns, clearing brush, painting and automobile washing. The chores were an integral part of the learning environment and curriculum of Respondents. The chores, among other things, allowed students to learn how to work as a team, and to develop senses of responsibility, accomplishment, pride and confidence to become more productive members of society.

Petitioner's references to alleged administration of Thorazine and other drugs, a purported murder before Petitioner's enrollment, purported sale of property, and other issues were not found by or before the courts below. (Pet. at 4-7). Indeed, Petitioner's references to alleged missed menstrual periods in relation to the alleged administration of Thorazine, and other contentions demonstrate that these allegations and misstatements bear no relation to him in any manner. (Pet. at 5-6). Since they were not before the courts below, Petitioner cannot raise them for the first time in this Court.

REASONS FOR DENYING THE PETITION

I. Petitioner Has Not Complied With The Rules Of This Court Because He Has Not Articulated A Compelling Reason To Justify Discretionary Review, And His Petition Contains Matters Not In The Record Below.

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." Sup. Ct. R. 10. "A petition for a writ of certiorari will be granted only for compelling reasons." *Id.* In the instant case, Petitioner has not presented any compelling reason for this Court to exercise discretionary jurisdiction to hear this case. The three issues addressed here and in his Petition were squarely addressed by both the district court and the Eighth Circuit. The Eighth Circuit's decision is not inconsistent with that of any other circuit court of appeals. The Eighth Circuit's decision is not inconsistent with the rulings of this Court and the Missouri courts of appeal.

In Point 4 of his brief, Petitioner attempts to implicate the due process clauses and right to jury trial clauses of the United States Constitution to support his Petition. (Pet. at 2; Pet., Point 4, at 24-26). However, such constitutional arguments were not raised with the Eighth Circuit. Further, in Point 4, Petitioner contends that he is raising a due process challenge that was not raised below, when in fact he is merely challenging the district court's discretionary rulings on evidence. There has been no violation of the due process clauses.

The Petition should be denied because it contains references to purported facts or events that were not before the courts below. Further, the Petition is replete with

references to alleged acts and events relating to persons other than Petitioner or Respondents. It is axiomatic that facts or events that were not before the district court and the court of appeals are not properly before this Court and they will not be considered by this Court.

The Statement of the Case in the Petition begins with a diatribe on the conduct of Petitioner's father, a person who was not a party to this lawsuit. (Pet. at 2-3). The conduct of his father has nothing to do with Petitioner's allegations against Respondents. Petitioner's Statement of the Case contains references to purported administration of antipsychotic drugs to persons other than the Petitioner. (*Id.* at 4). Petitioner's Statement also contains references about girls who purportedly missed their menstrual periods. (*Id.* at 5). These allegations have nothing to with Petitioner, or claims that Petitioner has against Respondents. Further, most of Petitioner's Conclusion contains references to other boarding schools and alleged experiences of persons who are not parties to this case. (Pet. at 28-30). Conversely, compare the statement of facts in the decisions of the district court and the Eighth Circuit decisions in the Appendix to the Petition. (Pet. App. at 3-5, 15-16, 19-20). There is no reference to allegations of wrongdoing by Petitioner's father, purported administration of Thorazine or other drugs or girls missing periods. (*Id.*). Since Petitioner cited to facts that were not before the courts below and Petitioner failed to offer a compelling reason for review, the Court should deny the Petition.

II. The Eighth Circuit Properly Affirmed The Lower Court's Decisions On The Issues Of State Action, The Fair Labor Standards Act, And False Imprisonment.

A. Respondents Were Not Acting Under Color of State Law When Petitioner Was Enrolled With Them.

Petitioner wrongly asserts that Respondents were acting under color of state law when he was enrolled with them. For a private person to be acting "under color of state law," that person must have a power possessed by virtue of state law and said power must be made possible "because the purported conduct is clothed with the authority of state law." *West v. Atkins*, 487 U.S. 42, 49 (1988). The private person must have, and the facts must establish, an "interdependence" with the state—the symbiotic relationship test. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961); *Adams v. Boy Scouts of Am. – Chickasaw Council*, 271 F.3d 769, 777-78 (8th Cir. 2001) (conduct of a private party may be attributed to the government where the government is in a position of interdependence with the private party, *i.e.*, a symbiotic relationship).

To support the argument that Respondents were acting under color of state law, Petitioner claims that he was "committed to Mountain Park by court order." (Pet. at 11). However, this is not true. Petitioner was enrolled with Respondents by his parents. The uncontroverted facts in the record below established that Petitioner's parents: (a) desired that their son be enrolled with Respondents, (b) completed and submitted an application to enroll Petitioner with Respondents, and (c) paid the tuition to enroll Petitioner with

Respondents. Further, the juvenile court's order does not select Respondents. (Pet. App. at 4, 9-10).

Petitioner offered no evidence of the requisite "interdependence" between the government and Respondents, or that Respondents were acting under the authority of the government. Indeed, the evidence below showed that Respondents: (a) never accepted nor received funds from any government agency; (b) never accepted students on referral from federal agencies or state agencies or courts; and (c) accepted students only upon application from the students' parents. There is no evidence in the record to controvert these facts. There is no state action.

Finally, no State could, consistent with the Constitution, utilize Respondents' schools in any meaningful way given their absolute reliance on fundamental Christian religion as "the" basis for their actions and decisions. Such action would be inconsistent with First Amendment principles of separation of church and state. The State was not and is not involved. Respondents were not and could not have been state actors.

B. The Lower Courts Did Not Err In Finding That Respondents Were Not Employers And Petitioner Was Not An Employee Under The Fair Labor Standards Act.

In his first point, Petitioner attempts to contend that he was an "employee" of Respondents under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201, *et seq.* (2000). During trial, the district court granted Respondents' motion for judgment as a matter of law at the close of all the evidence, finding that Petitioner was not an employee under the FLSA.

Petitioner claims that this issue should have been submitted to a jury. (Pet. at 8).

Whether or not an individual is an 'employee' within the meaning of the FLSA is a legal determination rather than a factual one. *Icicle Seafoods v. Worthington*, 475 U.S. 709, 714 (1986); *Donovan v. American Airlines, Inc.*, 726 F.2d 415, 417 (8th Cir. 1984)(the question of whether a particular set of facts and circumstances constitutes work under the FLSA is a question for the court to answer).

Under the FLSA, one is employed for performing or working in covered activities and employers must pay the minimum wage for said work. 29 U.S.C. § 206 (2000). The definition of "employ," to suffer or permit to work, was not intended to label all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another. "Otherwise, all students would be employees of the school or college they attended, and as such [would be] entitled to receive minimum wages" under the FLSA. *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947) (resident trainees were not employees under the FLSA).

The determination of employment under the FLSA requires satisfaction of an "economic reality" test that views and considers the circumstances of the whole activity. *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961); *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 726-27 (1947).

The unrefuted evidence at trial was that Petitioner, like all students enrolled with Respondents, performed chores around the campus that included, laundry, cleaning the dorm,

mowing lawns, clearing brush and painting. These chores were not done off of the campus. They were not offered to the public or in the marketplace, and they were not offered for commercial gain. Rather, the evidence was that the chores were an integral part of the curriculum Respondents offered. The students performed the chores together to develop team-building skills. These activities were intended primarily for the students' benefit, to instill a sense of responsibility, pride and achievement.

Applying the economic reality test to the totality of the circumstances in the evidence, the courts below found that the primary purpose of the chores was educational and that they were not performed for commercial gain. The courts concluded that Petitioner was not an employee as a matter of law, and that there was no way a jury could find that Petitioner was an employee.

Similar results were reached in other cases that have addressed the same issue. *See Marshall v. Regis Educ. Corp.*, 666 F.2d 1324, 1326-27 (10th Cir. 1981) (dormitory assistants were not employees of a college—the primary objective of the program was educational); *Bobilin v. Board of Educ., State of Hawaii*, 403 F. Supp. 1095 (D. Haw. 1975) (public school students who were assigned "cafeteria duty" were not employees—the purpose of the chore was educational). As a matter of law, Petitioner was not an employee under the FLSA. He failed to make a submissible case that could get to a jury. Therefore, he had no right to have the jury consider his claim.

C. The Eighth Circuit Did Not Err In Finding That Respondents Were Entitled To Summary Judgment On Petitioner's False Imprisonment Claim Because Petitioner Was Enrolled With Respondents By His Parents, Who Had The Authority To Make Decisions Regarding Their Son.

Petitioner alleged that he was falsely imprisoned by Respondents. When Petitioner's parents enrolled him at Mountain Park, he was 16 years old. False imprisonment is a common law state claim. In Missouri, to prove a civil claim of false imprisonment, a plaintiff must demonstrate that the defendant intentionally confined the plaintiff without consent and without legal justification. *Rankin v. Venator Group Retail, Inc.*, 93 S.W.3d 814, 819 (Mo. App. 2002); *Gulley v. Werth*, 61 S.W.3d 293, 296 (Mo. App. 2001) (a psychiatrist was found not to have committed false imprisonment when the plaintiff's husband requested that the plaintiff be committed).

Since Petitioner was 16 and 17 years old during his enrollment, whether he was a minor and whether Respondents had consent from his parents are critical issues to the viability of his claim. The Missouri Legislature authorizes that parents retain rights over a child "under eighteen years of age," and a "minor" is a person who has not attained the age of eighteen years. *See generally* Mo. Rev. St. §§ 211.442, *et seq.* (2000) (actions to terminate or restrict parental rights may be initiated with respect to his or her child, which is defined as individual under the age of 18). Missouri's Probate Code defines a "minor" as "any person who is under the age of eighteen years." Mo. Rev. St. § 475.010 (2000). Regardless of the statute

considered, Petitioner was a minor during the relevant time periods.

Parents have the right to direct the education of their children, including deciding where and how their minor children will be educated. *See Doe "A" v. Special Sch. Dist. of St. Louis Cty.*, 637 F. Supp. 1138, 1146 (E.D. Mo. 1986); *see generally In re Monnig*, 638 S.W.2d 782 (Mo.App. 1982). Indeed, parents may delegate that authority on behalf of their minor child. Mo. Rev. St. § 431.061 (2000); Mo. Rev. St. § 631.105 (2000). Here, Petitioner's parents applied to enroll him with Respondents. The parents completed and signed an application, a limited power of attorney and other documents. Petitioner's parents enrolled him voluntarily and with consent after learning about Respondents' curriculum and program. Petitioner contended that his parents' consent was not informed. However, the record below contains no evidence that the consent was not informed.

Applying Missouri law to the facts, both the district court and the Eighth Circuit found that Petitioner cannot maintain a claim for false imprisonment under Missouri law because his parents had given informed consent for his enrollment. (Pet. App. at 10). This finding was supported by the affidavits of Petitioner's own parents who stated that they "fully understood and agreed with and to the religious, moral and educational principals" [sic] of Respondents. (*Id.*). Petitioner failed to offer material facts to the district court that controverted this finding. When presented with Missouri law on false imprisonment, as well as Missouri's laws on parental rights, the courts below correctly found that summary judgment was appropriate. Therefore, the Petition should be denied.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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